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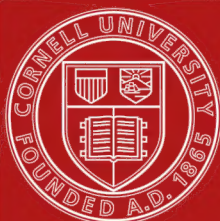
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**National bank cases, containing all decis**



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NATIONAL BANK CASES,  
CONTAINING  
ALL DECISIONS  
OF BOTH  
THE FEDERAL AND STATE COURTS  
RELATING TO  
NATIONAL BANKS,  
WITH  
NOTES AND REFERENCES,

BY ISAAC GRANT THOMPSON,

Editor of THE ALBANY LAW JOURNAL and of THE AMERICAN REPORTS.

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1864-1878.

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## PREFACE.

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I have endeavored to present in this volume a complete collection of all the cases relating to National banks. I have carefully gone over the volumes of reports, both Federal and State, published since 1864 — when the National Banking Act was passed — examining each case. I have in addition examined the various legal periodicals published since that date; and from these sources I have gathered every adjudication found pertaining to National banks. I have also added some cases not heretofore published in any form. The cases that have been superseded by a change in the statute laws or have been overruled by the higher courts, I have reported briefly in the Memoranda at the end of the volume.

I believe I have omitted nothing that could, by any possibility, be of use to any one; on the other hand I have included some cases of no considerable value to-day, but they were necessary to make the collection complete, and they will, at least, serve to illustrate the history of the law relating to National banks and the reasons upon which some of its most important rules were based.

Of the wisdom of the National Banking Act this volume affords the most convincing proof. Projected without precedent or experience,—prescribing a financial system for a great commercial people at the gloomiest period of its financial history,—superseding the peculiar schemes of the several States and trenching upon what, from use, they had come to consider their special prerogative, it was yet drafted with such judgment and skill that the experience of fourteen years has shown but few particulars in which it could be improved by the “amending hand,” while its terms are so clear and explicit that there has scarcely been a difference among the Courts as to its interpretation.

ISAAC GRANT THOMPSON.

ALBANY, *May* 4, 1878.





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CASES DECIDED

IN THE

SUPREME COURT

OF THE

UNITED STATES.

---

VAN ALLEN v. THE ASSESSORS.

(3 Wallace, 573.)

*Taxation of shares of National banks under State statutes.*

A State may authorize the taxation of the stock of National banks in the hands of stockholders, although the capital of such banks be wholly invested in stocks and bonds of the United States.

A State statute provided that shares in National banks should be taxed "but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals of this State." The State banks were taxed on their capital, but not on their shares. *Held*, that a tax on the capital was not equivalent to a tax on the shares of stockholders, and that, therefore, the statute was void under that provision of the National Banking Act which forbids a State to impose on a National bank a tax greater than is imposed on the State banks.

THIS was an action involving the question of the right of a State to tax shares in National banks created under the act of Congress of 3 June, 1864 (13 Stat. at Large, 668).

By a statute of the State of New York passed March 9, 1865 (Laws 1865, ch. 97), entitled "An act enabling the banks of this State to become associations for the purpose of banking under the laws of the United States," it was provided as follows:

"§ 10. All the shares in any of the said banking associations, organized under .. the act of Congress, held by any person or body corporate, shall be included in the valuation of the personal property of such person or body corporate, or corporation, in the assessment of taxes in the town or ward where such banking association is located and not elsewhere, whether the holder thereof reside in such town or ward, or not; but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals of this State, provided that the tax so imposed upon such shares shall not exceed the par value thereof; and provided further, that the real estate of such association shall be subject to State, county or municipal taxes, to the same extent, according to the value, as other real estate is taxed."

Under this statute the assessors of the city of Albany assessed the plaintiff in error, Van Allen, for fifty shares, owned by him, of the capital stock of the First National Bank of Albany, and assessed all the shareholders in like manner for theirs.

At the time of the assessment, the whole capital of the bank was invested in various obligations of the Federal government, in regard to all of which, Congress had enacted, that "whether held by individuals, corporations, or associations," they should be "exempt from taxation by or under State authority."

On a case stated, the legality of the assessment was affirmed by the Supreme Court and the Court of Appeals of the State (33 N. Y. 161), and was thence taken to the Supreme Court of the United States on writ of error.

*Mr. Evarts, Mr. Sedgwick, Mr. Tremaine, Mr. Edmonds and Mr. Miller*, for Van Allen.

*Mr. Kernan, Mr. Parker and Mr. Reynolds*, for the Assessors.

Mr. Justice NELSON delivered the opinion of the court.

The decree of the Court of Appeals, from which this case comes to us, must be reversed, on the ground that the enabling act of the State of New York, passed March 9th, 1865, does not conform to the limitations prescribed by the 41st section of the act of Congress, passed June 3, 1864, organizing the National banks, and providing for their taxation. The defect is this: one of the limitations in the act of Congress is "that the tax so imposed under the laws of any State upon the shares of the associations authorized by this act, shall not exceed the rate imposed upon the shares of any of the banks organized under the authority of the State where such association is located." The enabling act of the State con-

tains no such limitation. The banks of the State are taxed upon their capital; and although the act provided that the tax on the shares of the National banks shall not exceed the par value, yet, inasmuch as the capital of the State banks may consist of the bonds of the United States, which are exempt from State taxation, it is easy to see that this tax on the capital is not an equivalent for a tax on the shares of the stockholders.

This is an unimportant question, however, as the defect may be readily remedied by the State legislature.

The main and important question involved, and the one which has been argued at great length and with eminent ability, is, whether the State possesses the power to authorize the taxation of the shares of these National banks in the hands of stockholders, whose capital is wholly vested in stock and bonds of the United States?

The court are of opinion that this power is possessed by the State, and that it is due to the several cases which have been so fully and satisfactorily argued before us at this term, as well as to the public interest involved, that the question should be finally disposed of. I shall proceed, therefore, to state, as briefly as practicable, the grounds and reasons that have led to their judgment in the case.

The first act providing for the organization of these National banks, passed 25th February, 1863, contained no provision concerning State taxation of these shares; but Congress reserved the right by the last section at any time "to amend, alter, or repeal the act." The present act of 1864 is a re-enactment of the prior statute, with some material amendments, of which the section concerning State taxation is one.

It will be readily perceived, on adverting to the act, that the powers and privileges conferred by it upon these associations are very great powers and privileges; founded upon a new use and application of these government bonds, especially the privilege of issuing notes to circulate in the community as money, to the amount of ninety per centum of the bonds deposited with the treasurer; thereby nearly doubling their amount for all the operations and business purposes of the bank. This currency furnishes means and facilities for conducting the operations of the associations, which, if used wisely and skillfully, cannot but result in great advantages and profits to all the members of the association — the shareholders of the bank.

In the granting of chartered rights and privileges by government, especially if of great value to the corporators, certain burdens are usually, if not generally, imposed as conditions of the grant. Accordingly we find them in their charter. They are very few, but distinctly stated.

They are, first, a duty of one-half of one per centum each half year, upon the average amount of its notes in circulation; second, a duty of one-quarter of one per centum each half year upon the average amount of its deposit; third, a duty of one-quarter of one per centum each half year on the average amount of its capital stock beyond the amount invested in United States bonds; and fourth, a State tax upon the shares of the association held by the stockholders, not greater than assessed on other moneyed capital in the State, nor to exceed the rate on shares of stock of State banks.

These are the only burdens annexed to the enjoyment of the great chartered rights and privileges that we find in this act of Congress; and no objection is made to either of them except the last,—the limited State taxation.

Although it has been suggested, yet it can hardly be said to have been argued, that the provision in the act of Congress concerning the taxation of the shares by the State is unconstitutional. The suggestion is that it is by the State upon the bonds of the government which constitute the capital of the bank, and which this court has heretofore decided to be illegal. But this suggestion is scarcely well founded; for were we to admit, for the sake of the argument, this to be a tax of the bonds or capital stock of the bank, it is but a tax upon the new uses and new privileges conferred by the charter of the association; it is but a condition annexed to the enjoyment of this new use and new application of the bonds; and if Congress possessed the power to grant them these new rights and new privileges, which none of the learned counsel has denied, and which the whole argument assumes, then we do not see but the power to annex the conditions is equally clear and indisputable. The question involved is altogether a different one from that decided in the previous bank cases, and stands upon different considerations. The State tax, under this act of Congress, involves no question as to the pledged faith of the government. The tax is the condition for these new rights and privileges conferred upon these associations.

But, in addition to this view, the tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purposes for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. This is familiar law, and will be found in every work that may be opened on the subject of corporations. A striking exemplification may be seen in the case of *The Queen v. Arnoud*, 9 Ad. & El. (N. S.) 806. The question related to the registry of a ship owned by a corporation. Lord DENMAN observed: "It appears to me that the British corporation is, as such, the sole owner of the ship. The individual members of the corporation are no doubt interested, in one sense, in the property of the corporation, as they may derive individual benefit from its increase, or loss from its decrease; but in no legal sense are the individual members the owners.

The interest of the shareholder entitles him to participate in the net profits earned by the bank in the employment of its capital, during the existence of its charter, in proportion to the number of his shares, and, upon its dissolution or termination, to his proportion of the property that may remain of the corporation after the payment of its debts. This is a distinct independent interest or property, held by the shareholder like any other property that may belong to him. Now, it is this interest which the act of Congress has left subject to taxation by the States, under the limitations prescribed, as will be seen on referring to it. That act provides as follows:

"That nothing in this act shall be construed to prevent all the shares of any of the said associations, held by any person or body corporate, from being included in the valuation of personal property of such person or corporation in the assessment of taxes imposed by and under State authority, at the place where such bank is located and not elsewhere; but not a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State; provided further, that the tax so imposed under the laws of any State, upon the share of the associations, authorized by this act, shall not exceed the rate imposed upon the shares of any of the banks organized under the authority of the State where such association is located;

provided, also, that nothing in this act shall exempt the real estate of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real estate is taxed." § 41.

It is said that Congress possesses no power to confer upon a State authority to be exercised which has been exclusively delegated to that body by the Constitution, and, consequently, that it cannot confer upon a State the sovereign right of taxation; nor is a State competent to receive a grant of any such power from Congress. We agree to this. But as it respects a subject-matter over which Congress and the States may exercise a concurrent power, but from the exercise of which Congress, by reason of its paramount authority, may exclude the States, there is no doubt Congress may withhold the exercise of that authority and leave the States free to act. An example of this relation existing between the Federal and State governments is found in the pilot laws of the States, and the health and quarantine laws. The power of taxation under the Constitution as a general rule, and as has been repeatedly recognized in adjudged cases in this court, is a concurrent power. The qualifications of the rule are the exclusion of the States from the taxation of the means and instruments employed in the exercise of the functions of the Federal government.

The remaining question is, has Congress legislated in respect to these associations, so as to leave the shares of the stockholders subject to State taxation?

We have already referred to the main provision of the act of Congress on this subject, and it will be seen it declares "that nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person, or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority, at the place where such bank is located;" and in another section of the act (40) it is declared, "that the president and cashier of every such association shall cause to be kept, at all times, a full and correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, in the office where its business is transacted, and such list shall be subject to the inspection of all shareholders and creditors of the association, and the officers authorized

to assess taxes under State authority during business hours of each day," etc.

These two provisions — the one declaring that nothing in the act shall be construed to prevent the shares from being included in the valuation of the personal property, etc., in the assessment of taxes imposed by State authority; and the other providing for the keeping of the list of the names and residences of the shareholders, among other things, for the inspection of the officers authorized to assess the State taxes—not only recognize, in express terms, the sovereign right of the State to tax, but prescribe regulations and duties to these associations, with a view to disembarass the officers of the State engaged in the exercise of this right. Nothing, it would seem, could be made plainer, or more direct and comprehensive on the subject. The language of the several provisions is so explicit and positive as scarcely to call for judicial construction.

Then as to the shares and what is intended by the use of the term? The language of the act is equally explicit and decisive.

The persons forming an association are required to make a certificate, which shall specify, among other things, the amount of its capital stock, and the number of shares into which the same shall be divided, and the names and places of residence of the shareholders, and the number of shares held by each. (§ 6.) The capital stock shall be divided into shares of one hundred dollars each, and shall be deemed personal property. The shareholders of the association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein at the par value, in addition to the amount invested in such shares. (§ 12.) In the election of directors, and in deciding all questions at meetings of shareholders, each shareholder shall be entitled to one vote on each share of stock held by him. (§ 11.) Fifty per centum of the capital stock of every association shall be paid in before it shall commence business, and the remainder in installments of at least ten per centum per month till the whole amount is paid; and if any shareholder, or his assignee, shall fail to make the payment, or any installment on his stock, the directors may sell the stock at public auction. (§§ 14, 15.) No association shall make any loan or discount on the security of the shares of its own capital. (§ 35.)

We have already referred to the list of the names and residences of the shareholders, and the number of shares, to be kept for the inspection of the State assessors.

Now, in view of these several provisions in which the term shares, and shareholders, are mentioned, and the clear and obvious meaning of the term in the connection in which it is found, namely, the whole of the interest in the shares and of the shareholders ; when the statute provides that nothing in this act shall be construed to prevent all the shares in any of the said associations, etc., from being included in the valuation of the personal property of any person or corporation in the assessment of taxes imposed by State authority, etc., can there be a doubt that the term "shares," as used in this connection, means the same interest as when used in the other portions of the act ? Take, for example, the use of the term in the certificate of the numbers of shares in the articles of association, in the division of the capital stock into shares of one hundred dollars each ; in the personal liability clause, which subjects the shareholder to an amount, and, in addition, to the amount invested in such shares ; in the election of directors, and in deciding all questions at meetings of the stockholders, each share is entitled to one vote ; in regulations of the payments of the shares subscribed ; and, finally, in the list of shares kept for the inspection of the State assessors. In all these instances, it is manifest that the term, as used, means the entire interest of the shareholder ; and it would be singular, if, in the use of the term in the connection of State taxation, Congress intended a totally different meaning, without any indication of such intent.

This is an answer to the argument that the term, as used here, means only the interest of the shareholder as representing the portion of the capital, if any, not invested in the bonds of the government, and that the State assessors must institute an inquiry into the investment of the capital of the bank ; and ascertain what portion is invested in these bonds, and make a discrimination in the assessment of the shares ; if Congress had intended any such discrimination, it would have been an easy matter to have said so ; certainly, so grave and important a change in the use of this term, if so intended, would not have been left to judicial construction.

Upon the whole, after the maturest consideration which we have been able to give to this case, we are satisfied that the States possess the power to tax the whole of the interest of the shareholder



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in the shares held by him in these associations, within the limit prescribed by the act authorizing their organization. But, for the reasons stated in the forepart of the opinion, the judgment must be reversed and the case remitted to the Court of Appeals of the State of New York, with directions to enter judgment for the plaintiffs in error, with costs.

Chief Justice CHASE delivered a dissenting opinion, in which Justices WAYNE and SWAYNE concurred.

*Judgment reversed* and the case remitted to the Court of Appeals of the State of New York, with direction to enter judgment for the plaintiffs in error, with costs.

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PEOPLE v. THE COMMISSIONERS.

(4 Wallace, 244.)

*Taxation of National banks under State laws — Section 41 of the National Bank Act construed — Rate of taxation.*

The 41st section of the National Banking Act which provides that shares in National banks may be taxed by the States, "but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such States," means that the rate of taxation of the shares shall be the same, or not greater than upon moneyed capital of the individual citizen which is subject to taxation.

Therefore, *held*, that the fact that individual citizens were not assessed on United States securities owned by them was not a valid reason against the validity of the State tax on the shares of National banks, the capital of which was invested in United States bonds.

**C**ERTIORARI to the commissioners of taxes and assessments for the city of New York, issued out of the Supreme Court of the State of New York, on the relation of Denning Duer and of Ralph Mead. The facts are sufficiently stated in the opinion of the court.

W. M. Evarts, B. D. Silliman, J. E. Burrill and E. S. Van Winkle, for relators.

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*C. O'Connor, A. J. Parker, R. O'Gorman and W. Hutchins*, for respondents.

Mr. Justice NELSON delivered the opinion of the court.

These cases are writs of error to the Court of Appeals of the State of New York. The relator in the first is an owner of one hundred and fifty-two shares of stock in the National Bank of Commerce in New York.

The capital of the bank consists of one hundred thousand shares of one hundred dollars each, and which is invested in United States securities, and exempt from State taxation. The commissioners of taxes, in making their assessments, valued the shares at par, and imposed upon them the same rate of tax as was imposed upon other personal property in this city.

The commissioners, in their return to the *certiorari*, state that in estimating the value of the shares, they made no deduction on account of the investment of the capital of the bank in United States securities. That in the valuation of the personal estate of individuals, these securities held and owned by them were deducted and the tax assessed on the balance; and the like deductions were made from the capital of insurance companies.

The assessment of this tax on the shares of the relator in the Bank of Commerce was carried to the Supreme Court of the State, and, after argument, was affirmed, and thence to the Court of Appeals, where the judgment of the Supreme Court was affirmed. The case is now here on error under the twenty-fifth section of the Judiciary Act.

The first objection taken to the legality of the tax is on the ground that the commissioners in the valuation of the shares refused to deduct the amount of capital of the bank invested in United States securities, and hence refused to regard this deduction in the valuation of the shares.

This question has heretofore been considered by this court, and after full deliberation, determined, in the case of *Van Allen v. The Assessors*, 3 Wall. 573 (*ante*, p. 1), and need not again be examined. That case was one of the large class of cases which were very thoroughly argued, and received, at the time, the most careful examination of the court.

The next, and perhaps the only material question in the case, arises upon a construction of a clause in the first proviso of the

forty-first section of the National Bank Act. After referring to the taxation of these shares by State authority, it provides "But not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

It is argued that the assessment upon the shares of the relator is at a greater rate than that of the personal property of individual citizens, upon the ground that allowance was made on account of United States securities held and owned by them, when at the same time the deduction was disallowed to him.

The answer is, that upon a true construction of this clause of the act, the meaning and intent of the law-makers were, that the rate of taxation of the shares should be the same, or not greater, than upon the moneyed capital of the individual citizen which is subject or liable to taxation. That is, no greater proportion or percentage of tax in the valuation of the shares should be levied than upon other moneyed taxable capital in the hands of the citizens.

This rule seems to be as effectual a test to prevent unjust discrimination against the shareholders as could well be devised. It embraces a class which constitute the body politic of the State, who make its laws and provide for its taxes. They cannot be greater than the citizens impose upon themselves. It is known as sound policy, that in every well-regulated and enlightened State or government, certain descriptions of property, and also certain institutions — such as churches, hospitals, academies, cemeteries, and the like — are exempt from taxation; but these exemptions have never been regarded as disturbing the rates of taxation, even where the fundamental law had ordained that it should be uniform.

The objection is a singular one. At the time Congress enacted this rule as a limitation against discrimination, it was well known to that body that these securities in the hands of the citizen were exempt from taxation. It had been so held by this court, and, for abundant caution, had passed into a law.

The argument founded on the objection, if it proves any thing, proves that these securities should have been taxed in the hands of individuals to equalize the taxation; and hence that Congress, by this clause in the proviso, intended to subject them, as thus situated, to taxation; and, therefore, there was error in the deduction. This we do not suppose is claimed. But if this is not the result of the argument, then the other conclusion from it is, that Congress

required that the commissioners should deduct the securities, and at the same time intended the deduction, if made, should operate as a violation of the rate of the tax prescribed. We dissent from both conclusions, and think a sound construction of the clause, and one consistent with its words and intent, is also consistent with all the acts of Congress on the subject.

The commissioners, in their return, state that insurance companies created under the laws of the State, and doing business in the city of New York, were respectively assessed upon the balance of their capital and surplus profits, liable to taxation, after deducting therefrom such part as is invested in United States securities.

Another objection taken is, that the taxation of the shares of the relator is illegal, on account of this deduction, it being a departure from the rate of assessment prescribed in the clause already cited.

The answer is, that this clause does not refer to the rate of assessment upon insurance companies as a test by which to prevent discrimination against the shares; that is, confined to the rate of assessments upon moneyed capital in the hands of individual citizens. These institutions are not within the words or the contemplation of Congress; but even if they were, the answer we have already given to the deduction of these securities in the assessment of the property of individual citizens is equally applicable to them. These companies are taxed on their capital, and not on the shareholder, at the same rate as other personal property in the State. There is not much danger to be apprehended of a discriminating tax in their favor, prejudicial to the rights or property of the citizen; and, of course, to the rights of the shareholders in these National banks, who stand on the same footing.

The relator in the second case, Ralph Mead, is the holder and owner of twenty-five shares of stock in the Corn Exchange Bank, in the city of New York, incorporated under the laws of the State.

The act of April 23d, 1866, imposed a tax on the shares of these banks.

It is insisted that the tax is illegal on account of the refusal of the commissioners to deduct the United States securities in which a portion of the capital stock of the bank was invested.

The general question was distinctly presented in the bank cases of the last term, of which *Van Allen v. The Assessors* was one of

the class (3 Wall. 573, 583 and 584), and disposed of. It was there said: "But, in addition to this view, the tax on the shares is not a tax on the capital of the bank. The corporation is the legal owner of all the property of the bank, real and personal; and within the powers conferred upon it by the charter, and for the purpose for which it was created, can deal with the corporate property as absolutely as a private individual can deal with his own. The interest of the shareholder entitles him to participate in the net profits earned by the bank, in the employment of its capital, during the existence of its charter, in proportion to the number of his shares; and upon its dissolution or termination, to his proportion of the property that may remain, of the corporation, after the payment of its debts. This is a distinct independent interest or property, held by the shareholder like any other property that may belong to him;" and, we add, of course, is subject to like taxation.

It was supposed, on the argument, that this principle was in conflict with that which governed the decision of this court in the case of *Gardner v. The Appeal Tax Court*, 3 How. 133; but this is a mistake. That case turned upon the construction of an act of Maryland, exempting the bank from taxation on account of a large bonus to the State for the extension of the charter. This court held, that upon a true construction of the act, the stockholders were within the scope of the exemption. The court say: "In whatever way we examine the acts of 1813 and 1821, we are of opinion that it appears, from the eleventh section in those acts, to have been the intention of the legislatures which passed them, to exempt the stockholders from taxation as persons, on account of the stock which they owned in the banks.

Some other questions were discussed on the argument, besides those we have noticed, but they are questions of which this court cannot take cognizance. We have examined all of them that are here under the twenty-fifth section of the Judiciary Act.

*Judgment of the court below affirmed.*

The CHIEF JUSTICE: In concurrence with my brothers WAYNE and SWAYNE, I dissent from the opinion just read. The reasons of dissent sufficiently appear in our dissenting opinion in the case of *Van Allen v. The Assessors*, read at the last term, and we do not think it necessary to repeat them.

## BRADLEY v. THE PEOPLE.

(4 Wallace, 459.)

*State taxation of National banks.*

A tax on the capital of a bank is not equivalent to a tax on the shares, and therefore, where State banks are taxed on their capital only, a State statute imposing a tax on the shares of National banks is void. *Van Allen v. The Assessors, ante*, p. 1, affirmed.

WRIT of error to the Supreme Court of Illinois, to review a decision of that court revising a decision of the board of supervisors of Peoria county, to the effect that the shares of stock of National banks held by Bradley were not subject to a State and county tax. The State Supreme Court held the shares liable to such tax. (39 Ill. 130.)

The objection to the validity of the tax was, that under the State statute the shares of National banks were taxed at a greater rate than State banks, the latter being taxed only on their capital stock, and not on the shares held by stockholders.

*Messrs. Dexter and Walker*, for the shareholders, plaintiffs in error.

*Mr. Palmer, contra.*

Mr. Justice NELSON delivered the opinion of the court.

The question raised in this case came before us in the case of *Van Allen v. The Assessors*, 3 Wall. 573, 581 (*ante*, p. 1), from New York, where the statute taxing the State banks was substantially like that of Illinois. We there held the tax unauthorized for the defect stated.

It was in that case attempted to be sustained on the same ground relied on here, that the tax on the capital was equivalent to tax on the shares, as respected the shareholders. But the position was answered that, admitting it to be so, yet, inasmuch as the capital of the State banks may consist of the bonds of the United States, which were exempt from State taxation, it was not easy to see that the tax on the capital was an equivalent to a tax on the shares.

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Austin v. The Aldermen.

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We see no distinction between the two cases, and the judgment of the court below must be reversed, and the proceedings remanded, with directions to enter a judgment affirming the decision of the board of supervisors.

*Judgment accordingly.*

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AUSTIN v. THE ALDERMEN.

(7 Wallace, 694.)

*Taxation of shares — Where to be taxed.*

A State statute required the assessors of each city and town in which any shareholder in National banks resided to include such shares in the assessment of such person. The defendant resided in Boston, owned shares in several National banks there situated, and was there assessed on such shares. He refused to pay the tax on the ground that the State statute was in violation of the National Banking Act permitting States to tax shares of National banks "at the place where such bank is located and not elsewhere." *Held*, that as in this case the assessment was in conformity to the act of Congress, the defendant had no cause for complaint and could not impeach the validity of the State statute.

**E**RROR to the Supreme Judicial Court of Massachusetts.

The action was brought by the aldermen of Boston to recover a tax which the city had assessed on defendant's bank stock. The case was reported below in 14 Allen, 359.

The opinion states other facts.

*I. J. Austin*, for plaintiff in error.

No argument on the other side.

Mr. Justice SWAYNE delivered the opinion of the court.

This case is brought before us by a writ of error, issued pursuant to the twenty-fifth section of the Judiciary Act of 1789.

The legislature of Massachusetts, by a statute passed on the 15th of May, 1865 (ch. 242), provided for "the taxation of shares in associations for banking, established under the laws of the United States," and prescribed the mode of procedure for that purpose. The statute is confined to such associations in that State, and to

shares held by persons living within its limits. The third section enacts that the assessment for taxation shall be made where the shareholders reside.

The proviso in the act of Congress which permits the shares to be taxed by the States, requires them to be included "in the valuation of the personal property" of the holder, "in the assessment of taxes imposed by or under State authority, at the place where such bank is located, and not elsewhere." Act of June 3, 1864, ch. 106, § 41, 13 Stat. at Large, 112. There are other regulations upon the subject, but they do not affect the point to be considered, and need not to be more particularly adverted to.

The plaintiff in error lived in Boston, and was the owner of stock in six National banks there situated, and the valuation and assessment were there made.

It is not denied that this was in conformity to the act of Congress, but it is insisted that the taxes assessed were illegal and void, because the statute of the State requires that they shall be assessed at the place of the residence of the shareholder, without reference to the locality of the bank.

The only question of Federal jurisdiction, and of which this court can take cognizance is, whether the plaintiff in error has been deprived of any right, contrary to the act of Congress, upon which he relies for protection.

The facts bring the case within the terms of the act, according to the strictest construction which can be given to them. This is conclusive of the case. Whether, in another case, arising upon a different state of facts, the statute may not produce results in conflict with the act of Congress, and which this court will therefore be bound to revise and correct, is an inquiry upon which we are not called to enter. We can only consider the statute in connection with the case before us. Having ascertained that it has wrought no effect which the act forbids, our jurisdiction is at an end. The twenty-fifth section of the Judiciary Act is explicit upon the subject.

The right of taxation, where it exists, is necessarily unlimited in its nature. It carries with it inherently the power to embarrass and destroy.

It is well settled that the States cannot exercise this authority in respect to any of the instrumentalities which the general government may create for the performance of its constitutional func-



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tions. It is equally well settled that this exemption may be waived wholly, or with such limitations and qualifications as may be deemed proper by the law-making power of the nation ; but the waiver must be clear, and every well-grounded doubt upon the subject should be resolved in favor of the exemption.

In respect to the class of cases to which the one before us belongs, the waiver is expressed in clear and unmistakable language.

Important questions have arisen as to the construction and effect of the permission given to tax, by the act of Congress under consideration, with reference to the National securities held by the banks. These questions have been settled by this court in repeated decisions. *Van Allen v. The Assessors*, 3 Wallace, 573 ; *The People v. The Commissioners*, 4 id. 244 ; *Bradley v. The People*, id. 459.

In this case, the only question open for our examination must, for the reasons before stated, be resolved against the plaintiff in error.

*Judgment affirmed.*

## KENNEDY v. GIBSON.

(8 Wallace, 498.)

*Suits by receivers against stockholders — Parties — Suits by National banks.*

The provision of the National Banking Act that suits under it, in which officers or agents of the United States are parties, shall be conducted by the district attorney, is directory only, and the fact that private counsel is employed to conduct a suit by the receiver of a National bank against the stockholders thereof is not a matter of defense to the stockholders.

It is the duty of the Comptroller of the Currency to decide when proceedings are necessary against the stockholders of a National bank to enforce their personal liability, and to what extent such liability shall be enforced ; and in an action by a receiver to enforce such liability, such prior determination of the Comptroller must be distinctly averred and proved.

Where less than the entire liability of stockholders is sought to be enforced, proceedings may be had in equity and an interlocutory decree may be taken for contribution. Where contribution only is sought, all the stockholders who can be reached by the process of the court may be joined in the suit, and it will be no objection that there are others beyond the jurisdiction of the court who cannot, for that reason, be made co-defendants.

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Creditors of a National bank cannot proceed directly in their own name against the stockholders or debtors of the bank, nor are they proper parties to a suit by a receiver. \*

Suits may be brought by National banks as well as *against* them under section 57 of the National Banking Act, of June 3, 1864.

**A** PPEAL from a decree of the Circuit Court of the United States for the District of Maryland. The opinion states the case.

*Messrs. Brent and Merrick, for appellant.*

*Mr. Steele, contra.*

Mr. Justice SWAYNE delivered the opinion of the court.

This is an appeal in equity, from the decree of the Circuit Court of the United States for the District of Maryland. The bill was filed by the appellant. For the purposes of the points necessary to be considered, the case may be briefly stated. The appellant has been duly appointed receiver of the Merchants' Bank of Washington city, under the 50th section of the act of June 3d, 1864, and brings this bill to charge the defendants, who are alleged to be stockholders of the bank, with the personal liability prescribed by the 12th section of the act. The facts necessary to warrant the appointment of a receiver are sufficiently set forth. It is averred, that he "has already ascertained that the assets and credits of the association are wholly insufficient to pay its debts and liabilities, and that it will be necessary to the complete and entire administration of the trust reposed in him, that recourse shall be had to the personal liability imposed upon the stockholders;" that two thousand shares of the capital stock, amounting to \$200,000, were issued by the bank to its stockholders; that it will be necessary to collect from them this amount to make good the deficiency in the means to meet the balance of the indebtedness of the bank, which will remain after the application of all the available assets, to the discharge of its liabilities, and that "after such application is made, a balance of the indebtedness will remain due, largely exceeding the said sum of \$200,000." The stockholders, besides the defendants, are named, and it is alleged that a part of them reside in the District of Columbia, and one of them in the State of New York. The prayer of the bill is, that an account may be taken, and that each of the defendants shall be decreed to pay to the re-

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\* See, however, Act of Congress of June 30, 1876, section 2.

ceiver his *pro rata* share of the indebtedness of the bank, which may remain, after applying to the liabilities all its effects, as required by the act before mentioned, and for general relief. The bill is signed by the special counsel of the receiver. The name of the attorney of the United States does not appear in the case. The defendants demurred. Our opinion will cover all the points brought to our attention by their counsel in the argument, without particularly stating them.

The receiver is the agent of the United States, and, according to the 56th section of the act (13 Stat. at Large, 116), this suit should have been conducted by their attorney. But this provision is merely directory. The question which arises is between the United States and its officers. The rights of the defendants are in nowise concerned, and they cannot be heard to make the objection, that this duty of the local law officer of the government has been devolved upon another. It is to be presumed there were sufficient reasons to warrant this departure from the letter of the law.

The 50th section of the act provides, that the receiver, under the direction of the Comptroller of the Currency, shall take possession of the books and assets of every description of the association, collect all the debts and claims belonging to it, and may — proceeding in the manner prescribed — sell or compound bad and doubtful debts, and sell all its real and personal property; “and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders.” He is required to pay all the moneys he may realize to the Treasurer of the United States, subject to the order of the Comptroller, and to report to the Comptroller all his proceedings. The Comptroller is required to give notice to all persons having claims against the association to present and prove them, and after making provision for refunding to the United States “any deficiency in redeeming the notes of such association, as mentioned in this act,” to make a ratable dividend of the moneys paid over to him by the receiver, “on all claims which have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction.” He is to make further dividends, from time to time, as the means shall come into his hands, “on all claims previously proved or adjudicated, and the remainder of the proceeds, if any, shall be paid over to the stockholders of such association or their legal representatives.”

The receiver is the instrument of the Comptroller. He is appointed by the Comptroller, and the power of appointment carries with it the power of removal. It is for the Comptroller to decide when it is necessary to institute proceedings against the stockholders to enforce their personal liability, and whether the whole or a part, and if only a part, how much shall be collected. These questions are referred to his judgment, and discretion, and his determination is conclusive. The stockholders cannot controvert it. It is not to be questioned in the litigation that may ensue. He may make it at such a time as he may deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, whenever the personal liability of the stockholder is sought to be enforced, and must precede the institution of suit by the receiver. The fact must be distinctly averred in all such cases, and if put in issue must be proved.

The liability of the stockholders is several and not joint. The limit of their liability is the par of the stock held by each one. Where the whole amount is sought to be recovered the proceeding must be at law. Where less is required the proceeding may be in equity, and in such case an interlocutory decree may be taken for contribution, and the case may stand over for the further action of the court — if such action should subsequently prove to be necessary — until the full amount of the liability is exhausted. It would be attended with injurious consequences to forbid action against the stockholders until the precise amount necessary to be collected shall be formally ascertained. This would greatly protract the final settlement, and might be attended with large losses by insolvency and otherwise in the intervening time. The amount must depend in part upon the solvency of the debtors and the validity of the claims. Time will be consumed in the application of these tests, and the results in many cases cannot be foreseen. The same remarks apply to the enforced collections from the stockholders. A speedy adjustment is necessary to the efficiency and utility of the law; the interests of the creditors require it, and it was the obvious policy and purpose of Congress to give it. If too much be collected it is provided by the statute that any surplus which may remain, after satisfying all demands against the association, shall be paid over to the stockholders. It is better they should pay more than may prove to be needed than that the evils of delay should be encountered. When contribution only is sought, all the

stockholders who can be reached by the process of the court may be joined in the suit. It is no objection that there are others beyond the jurisdiction of the court who cannot for that reason be made co-defendants.

The claims of creditors may be proved before the Comptroller, or established by suit against the association. Creditors must seek their remedy through the Comptroller in the mode prescribed by the statute; they cannot proceed directly in their own name against the stockholders or debtors of the bank. The receiver is the statutory assignee of the association, and is the proper party to institute all suits; they may be brought both at law and in equity, in his name, or in the name of the association for his use. He represents both the creditors and the association, and when he sues in his own name it is not necessary to make either a party to the suit.

The 59th section of the act of February 25th, 1863, provides that all suits by or against such associations may be brought in the proper courts of the United States or of the State. The 57th section of the act of 1864 relates to the same subject, and revises and enlarges the provisions of the 59th section of the preceding act. In the latter the word "by," in respect to such suits, is dropped. The omission was doubtless accidental. It is not to be supposed that Congress intended to exclude the associations from suing in the courts where they can be sued. The difference in the language of the two sections is not such as to warrant the conclusion that it was intended to change the rule prescribed by the act of 1864. Such suits may still be brought by the associations in the courts of the United States. If this be not the proper construction, while there is provision for suits against the associations, there is none for suits by them, in any court. *Theriah v. Hart*, 2 Hill, 381, note.

The 59th section directs "that all suits and proceedings arising out of the provisions of this act, in which the United States or its officers or agents shall be parties, shall be conducted by the district attorneys of the several districts, under the direction and supervision of the Solicitor of the Treasury." Considering this section in connection with the succeeding section, the implication is clear that receivers also may sue in the courts of the United States by virtue of the act, without reference to the locality of their personal citizenship. *United States v. Babbit*, 1 Black, 61.

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Veazie Bank v. Fenno.

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The bill in the case before us contains no averment of any action by the Comptroller touching the personal liability of the stockholders. The demurrer of the defendants was, therefore, properly sustained, and the decree of the Circuit Court is

*Affirmed.*

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VEAZIE BANK V. FENNO.

(8 Wallace, 533.)

*Constitutional law — Right of Congress to tax circulation of State banks.*

The tax of ten per cent imposed by the act of July 13, 1866 (14 Stat. at Large, 146, § 9) on the circulation of State banks used for currency and paid out by the National or State banks is not repugnant to the Constitution, either on the ground that the tax is a direct tax which must be apportioned among the several States, or that the act impairs franchises granted by the State. Congress having undertaken, in the exercise of undisputed constitutional power, to provide a currency for the whole country, may constitutionally secure the benefit of it to the people by appropriate legislation, and to that end may restrain, by suitable enactments, the circulation of any notes not issued under its own authority.

ON certificate of division from the Circuit Court for Maine.  
The 9th section of the act of Congress of July 13, 1866 (14 Stats. at Large, 146), amendatory of the Internal Revenue Act, provided as follows:

“That every National banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of notes of any person, State bank, or State banking association, used for circulation and paid out by them after the 1st day of August, 1866, and such tax shall be assessed and paid in such manner as shall be prescribed by the commissioner of internal revenue.”

Under this act a tax of ten per cent was assessed upon the Veazie Bank, for its bank notes issued for circulation after the day named in the act.

The Veazie Bank was a corporation chartered by the State of Maine, with authority to issue bank notes for circulation, and the notes on which the tax imposed by the act was collected were issued under this authority. The bank refusing to pay the tax, the col-

lector of internal revenue, Fenno, was proceeding to distrain for it, whereupon the bank paid it under protest and brought this action against the collector to recover it. The court below was divided upon the question whether that portion of the act quoted above, was a valid and constitutional law.

*Reverdy Johnson and Caleb Cushing*, for the Veazie Bank.

*Mr. Hoar, Attorney-General, contra.*

Mr. Chief Justice CHASE delivered the opinion of the court.

The necessity of adequate provision for the financial exigencies created by the late rebellion suggested to the administrative and legislative departments of the government important changes in the systems of currency and taxation which had hitherto prevailed. These changes, more or less distinctly shown in administrative recommendations, took form and substance in legislative acts. We have now to consider, within a limited range, those which relate to circulating notes and the taxation of circulation.

At the beginning of the rebellion, the circulating medium consisted almost entirely of bank notes issued by numerous independent corporations, variously organized under State legislation, of various degrees of credit, and very unequal resources, administered often with great, and not unfrequently with little skill, prudence, and integrity. The acts of Congress, then in force, prohibiting the receipt or disbursement, in the transactions of the National government, of any thing except gold and silver, and the laws of the States requiring the redemption of bank notes in coin on demand, prevented the disappearance of gold and silver from circulation. There was, then, no National currency except coin; there was no general (see the act of December 27th, 1854, to suppress small notes in the District of Columbia, 10 Stat. at Large, 599), regulation of any other by National legislation, and no National taxation was imposed in any form on the State bank circulation.

The first act authorizing the emission of notes by the treasury department for circulation, was that of July 17th, 1861. 12 Stat. at Large, 259. The notes issued under this act were treasury notes, payable on demand in coin. The amount authorized by it was \$50,000,000, and was increased by the act of February 12th, 1862 (*id.* 338), to \$60,000,000.

On the 31st of December, 1861, the State banks suspended specie payment. Until this time the expenses of the war had been paid in coin, or in the demand notes just referred to; and, for some time afterward, they continued to be paid in these notes, which, if not redeemed in coin, were received as coin in the payment of duties.

Subsequently, on the 25th of February, 1862 (*id.* 345), a new policy became necessary in consequence of the suspension, and of the condition of the country, and was adopted. The notes hitherto issued, as has just been stated, were called treasury notes, and were payable on demand in coin. The act now passed authorized the issue of bills for circulation under the name of United States notes, made payable to bearer, but not expressed to be payable on demand, to the amount of \$150,000,000; and this amount was increased by subsequent acts to \$450,000,000, of which \$50,000,000 were to be held in reserve, and only to be issued for a special purpose, and under special directions as to their withdrawal from circulation. Act of July 11th, 1862, *id.* 532; act of March 3d, 1863, *id.* 710. These notes, until after the close of the war, were always convertible into, or receivable at par for bonds payable in coin, and bearing coin interest at a rate not less than five per cent, and the acts by which they were authorized declared them to be lawful money and a legal tender.

This currency, issued directly by the government for the disbursement of the war and other expenditures, could not, obviously, be a proper object of taxation.

But, on the 25th of February, 1863, the act authorizing National banking associations (Act of March 3d, 1863, 12 Stat. at Large, 670), was passed, in which, for the first time during many years, Congress recognized the expediency and duty of imposing a tax upon currency. By this act a tax of two per cent annually was imposed on the circulation of the associations authorized by it. Soon after, by the act of March 3d (1863, *id.* 712), a similar, but lighter tax of one per cent, annually, was imposed upon the circulation of State banks in certain proportions to their capital, and of two per cent on the excess; and the tax on the National associations was reduced to the same rates.

Both acts also imposed taxes on capital and deposits, which need not be noticed here.



At a later date, by the act of June 3d, 1864 (13 id. 111), which was substituted for the act of February 25th, 1863, authorizing National banking associations, the rate of tax on circulation was continued and applied to the whole amount of it, and the shares of their stockholders were also subjected to taxation by the States; and a few days afterward, by the act of June 30, 1864 (id. 277), to provide ways and means for the support of the government, the tax on the circulation of the State banks was also continued at the same annual rate of one per cent, as before, but payment was required in monthly installments of one-twelfth of one per cent, with monthly reports from each State bank of the amount in circulation.

It can hardly be doubted that the object of this provision was to inform the proper authorities of the exact amount of paper money in circulation, with a view to its regulation by law.

The first step taken by Congress in that direction was by the act of July 17, 1862 (act of March 3d, 1863, 12 Stat. at Large, 592), prohibiting the issue and circulation of notes under one dollar by any person or corporation. The act just referred to was the next, and it was followed some months later by the act of March 3d, 1865, amendatory of the prior internal revenue acts, the sixth section of which provides that every National banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of the notes of any State bank, or State banking association, paid out by them after the 1st day of July, 1866." 13 id. 484.

The same provision was re-enacted with a more extended application on the 13th of July, 1866, in these words: "Every National banking association, State bank, or State banking association, shall pay a tax of ten per centum on the amount of notes of any person, State bank, or State banking association, used for circulation, and paid out by them after the first day of August, 1866, and such tax shall be assessed and paid in such manner as shall be prescribed by the commissioner of internal revenue." 14 id. 146.

The constitutionality of this last provision is now drawn in question, and this brief statement of the recent legislation of Congress has been made for the purpose of placing in a clear light its scope and bearing, especially as developed in the provisions just cited. It will be seen that when the policy of taxing bank circulation was first adopted in 1863, Congress was inclined to discriminate for,

rather than against, the circulation of the State banks; but that when the country had been sufficiently furnished with a National currency by the issues of United States notes and of National bank notes, the discrimination was turned, and very decidedly turned, in the opposite direction.

The general question now before us is, whether or not the tax of ten per cent imposed on State banks or National banks paying out the notes of individuals or State banks used for circulation, is repugnant to the Constitution of the United States.

In support of the position that the act of Congress, so far as it provides for the levy and collection of this tax, is repugnant to the Constitution, two propositions have been argued with much force and earnestness.

The first is that the tax in question is a direct tax, and has not been apportioned among the States agreeably to the Constitution.

The second is, that the act imposing the tax impairs a franchise granted by the State, and that Congress has no power to pass any law with that intent or effect.

The first of these propositions will be first examined.

The difficulty of defining with accuracy the terms used in the clause of the Constitution, which confers the power of taxation upon Congress, was felt in the convention which framed that instrument, and has always been experienced by courts when called upon to determine their meaning.

The general intent of the Constitution, however, seems plain. The general government, administered by the Congress of the confederation, had been reduced to the verge of impotency by the necessity of relying for revenue upon requisitions on the States, and it was a leading object in the adoption of the Constitution to relieve the government to be organized under it from this necessity, and confer upon it ample power to provide revenue by the taxation of persons and property. And nothing is clearer, from the discussions in the convention and the discussions which preceded the final ratification by the necessary number of States, than the purpose to give this power to Congress, as to the taxation of every thing except exports, in its fullest extent.

This purpose is apparent, also, from the terms in which the taxing power is granted. The power is "to lay and collect taxes, duties, imposts and excises, to pay the debt and provide for the common defense and general welfare of the United States." More

comprehensive words could not have been used. Exports only are by another provision excluded from its application

There are, indeed, certain virtual limitations, arising from the principles of the Constitution itself. It would undoubtedly be an abuse of the power if so exercised as to impair the separate existence and independent self-government (*Lane County v. Oregon*, 7 Wallace, 73) of the States, or if exercised for ends inconsistent with the limited grants of power in the Constitution.

And there are directions as to the mode of exercising the power.

If Congress sees fit to impose a capitation, or other direct tax, it must be laid in proportion to the census; if Congress determines to impose duties, imports, and excises, they must be uniform throughout the United States. These are not strictly limitations of power. They are rules prescribing the mode in which it shall be exercised. It still extends to every object of taxation, except exports, and may be applied to every object of taxation to which it extends, in such measure as Congress may determine.

The comprehensiveness of the power, thus given to Congress, may serve to explain, at least, the absence of any attempt by members of the Convention to define, even in debate, the terms of the grant. The words used certainly describe the whole power, and it was the intention of the Convention that the whole power should be conferred. The definition of particular words, therefore, became unimportant.

It may be said, indeed, that this observation, however just in its application to the general grant of power, cannot be applied to the rules by which different descriptions of taxes are directed to be laid and collected.

Direct taxes must be laid and collected by the rule of apportionment; duties, imposts and excises must be laid and collected under the rule of uniformity.

Much diversity of opinion has always prevailed upon the question, What are direct taxes? Attempts to answer it by reference to the definitions of political economists have been frequently made, but without satisfactory results. The enumeration of the different kinds of taxes which Congress was authorized to impose was probably made with very little reference to their speculations. The great work of Adam Smith, the first comprehensive treatise on political economy in the English language, had then been recently published; but in this work, though there are passages

which refer to the characteristic difference between direct and indirect taxation, there is nothing which affords any valuable light on the use of the words "direct taxes" in the Constitution.

We are obliged, therefore, to resort to historical evidence, and to seek the meaning of the words in the use and in the opinion of those whose relations to the government and means of knowledge warranted them in speaking with authority.

And, considered in this light, the meaning and application of the rule, as to direct taxes, appears to us quite clear.

It is, as we think, distinctly shown in every act of Congress on the subject.

In each of these acts, a gross sum was laid upon the United States, and the total amount was apportioned to the several States, according to their respective numbers of inhabitants, as ascertained by the last preceding census. Having been apportioned, provision was made for the imposition of the tax upon the subjects specified in the act, fixing its total sum.

In 1798, when the first direct tax was imposed, the total amount was fixed at two millions of dollars (act of July 14th, 1798, Stat. at Large, 597) ; in 1813 the amount of the second direct tax was fixed at three millions (act of August 2d, 1813, 3 id. 53) ; in 1815 the amount of the third at six millions, and it was made an annual tax (act of July 9th, 1815, id. 164); in 1816 the provision making the tax annual was repealed by the repeal of the first section of the act of 1815, and the total amount was fixed for that year at three millions of dollars (act of March 5th, 1816, id. 255). No other direct tax was imposed until 1861, when a direct tax of twenty millions of dollars was laid and made annual (act of August 5th, 1861, 12 id. 294), but the provision making it annual was suspended, and no tax, except that first laid, was ever apportioned. In each instance the total sum was apportioned among the States by the constitutional rule, and was assessed at prescribed rates, on the subjects of the tax. These subjects, in 1798 (act of July 9th, 1798, 1 Stat. at Large, 586), 1813 (act of July 22d, 1813, 3 id. 26), 1815 (id. 166), 1816 (id. 255), were lands, improvements, dwelling-houses and slaves ; and in 1861, lands, improvements and dwelling-houses only. Under the act of 1798 slaves were assessed at fifty cents on each ; under the other acts, according to valuation by assessors.

This review shows that personal property, contracts, occupations and the like, have never been regarded by Congress as proper subjects of direct tax. It has been supposed that slaves must be considered as an exception to this observation. But the exception is rather apparent than real. As persons, slaves were proper subjects of a capitation tax, which is described in the Constitution as a direct tax; as property, they were, by the laws of some, if not most of the States, classed as real property, descendible to heirs. Under the first view, they would be subject to the tax of 1798, as a capitation tax; under the latter, they would be subject to the taxation of the other years as realty. That the latter view was that taken by the framers of the acts after 1798, became highly probable when it is considered that in the States where slaves were held, much of the value which would otherwise have attached to land passed into the slaves. If, indeed, the land only had been valued without the slaves, the land would have been subject to much heavier proportional imposition in those States than in States where there were no slaves; for the proportion of tax imposed on each State was determined by population, without reference to the subjects on which it was to be assessed.

The fact, then, that slaves were valued, under the acts referred to, far from showing, as some have supposed, that Congress regarded personal property as a proper object of direct taxation under the Constitution, shows only that Congress, after 1798, regarded slaves, for the purpose of taxation, as realty.

It may be rightly affirmed, therefore, that in the practical construction of the Constitution by Congress, direct taxes have been limited to taxes on land and appurtenances, and taxes on polls or capitation taxes.

And this construction is entitled to great consideration, especially in the absence of any thing adverse to it in the discussions of the conventions which framed, and of the conventions which ratified the Constitution.

What does appear in those discussions, on the contrary, supports the construction. Mr. Madison informs us (3 Madison Papers, 1337), that Mr. King asked what was the precise meaning of direct taxation, and no one answered. On another day, when the question of proportioning representation to taxation, and both to the white and three-fifths of the slave inhabitants, was under consideration, Mr. Ellsworth said: "In case of a poll tax, there would

be no difficulty ;" and speaking, doubtless, of direct taxation, he went on to observe : "The sum allotted to a State may be levied without difficulty, according to the plan used in the State for raising its own supplies." All this, doubtless, shows uncertainty as to the true meaning of the term "direct tax" ; but it indicates, also, an understanding that direct taxes were such as may be levied by capitation, and on lands and appurtenances ; or, perhaps, by valuation and assessment of personal property upon general lists. For these were the subjects from which the States at that time usually raised their principal supplies.

This view received the sanction of this court two years before the enactment of the first law imposing direct taxes *eo nomine*.

During the February term, 1796, the constitutionality of the act of 1794, imposing a duty on carriages, came under consideration in the case of *Hylton v. United States*, 3 Dallas, 171. Suit was brought by the United States against Daniel Hylton, to recover the penalty imposed by the act for not returning and paying duty on a number of carriages, for the conveyance of persons, kept by the defendant for his own use. The law did not provide for the apportionment of the tax, and, if it was a direct tax, the law was confessedly unwarranted by the Constitution. The only question in the case, therefore, was, whether or not the tax was a direct tax.

The case was one of great expectation, and a general interest was felt in its determination. It was argued, in support of the tax, by Lee, Attorney-General, and Hamilton, recently Secretary of the Treasury ; in opposition to the tax, by Campbell, attorney for the Virginia District, and Ingersoll, Attorney-General of Pennsylvania.

Of the justices who then filled this bench, ELLSWORTH, PATERSON and WILSON had been members, and conspicuous members, of the Constitutional Convention, and each of the three had taken part in the discussions relating to direct taxation. ELLSWORTH, the Chief Justice, sworn into office that morning, not having heard the whole argument, declined taking part in the decision, CUSHING, senior Associate Justice, having been prevented, by indisposition, from attending to the argument, also refrained from expressing an opinion. The other judges delivered their opinions in succession, the youngest in commission delivering the first, and the oldest the last.

They all held that the tax on carriages was not a direct tax, within the meaning of the Constitution. CHASE, Justice, was in-

clined to think that the direct taxes contemplated by the Constitution are only two : a capitation or poll tax, and a tax on land. He doubted whether a tax by a general assessment of personal property can be included within the term "direct tax." PATERSON, who had taken a leading part in the Constitutional Convention, went more fully into the sense in which the words, giving the power of taxation, were used by that body. In the course of this examination he said :

"Whether direct taxes, in the sense of the Constitution, comprehended any other tax than a capitation tax, and tax on land, is a questionable point. If Congress, for instance, should tax, in the aggregate or mass, things that generally pervade all the States in the Union, then, perhaps, the rule of apportionment would be the most proper, especially if an assessment was to intervene. This appears from the practice of some of the States to have been considered as a direct tax. Whether it be so, under the Constitution of the United States, is a matter of some difficulty ; but as it is not before the court, it would be improper to give any decisive opinion upon it. I never entertained a doubt that the principal — I will not say the only — objects that the framers of the Constitution contemplated as falling within the rule of apportionment were a capitation tax and a tax on land." 3 Dallas, 177.

IREDELL, J., delivering his opinion at length, concurred generally in the views of Justices CHASE and PATERSON. WILSON had expressed his opinion to the same general effect, when giving the decision upon the Circuit, and did not now repeat them. Neither Chief Justice ELLSWORTH nor Justice CUSHING expressed any dissent; and it cannot be supposed if, in a case so important, their judgments had differed from those announced, that an opportunity would not have been given them by an order for reargument to participate in the decision.

It may be safely assumed, therefore, as the unanimous judgment of the court, that a tax on carriages is not a direct tax, and it may further be taken or established upon the testimony of Paterson, that the words "direct taxes," as used in the Constitution, comprehended only capitation taxes, and taxes on land, and perhaps taxes on personal property by general valuation and assessment of the various descriptions possessed within the several States.

It follows necessarily that the power to tax without apportionment extends to all other objects. Taxes on other objects are in-

cluded under the heads of taxes not direct, duties, imposts, and excises, and must be laid and collected by the rule of uniformity. The tax under consideration is a tax on bank circulation, and may very well be classed under the head of duties. Certainly it is not, in the sense of the Constitution, a direct tax. It may be said to come within the same category of taxation as the tax on incomes of insurance companies, which this court, at the last term, in the case of *Pacific Insurance Co. v. Soule*, 7 Wallace, 434, held not to be a direct tax.

Is it, then, a tax on a franchise, granted by a State, which Congress, upon any principle exempting the reserved powers of the State from impairment by taxation, must be held to have no authority to lay and collect ?

We do not say that there may not be such a tax. It may be admitted that the reserved rights of the States, such as the right to pass laws, to give effect to laws through executive action, to administer justice through the courts, and to employ all necessary agencies for legitimate purposes of State government, are not proper subjects of the taxing power of Congress. But it cannot be admitted that franchises granted by a State are necessarily exempt from taxation ; for franchises are property, often very valuable and productive property ; and when not conferred for the purpose of giving effect to some reserved power of a State, seem to be as properly objects of taxation as any other property.

But in the case before us the object of taxation is, not the franchise of the bank, but property created, or contracts made and issued under the franchise, or power to issue bank bills. A railroad company, in the exercise of its corporate franchises, issued freight receipts, bills of lading, and passenger tickets, and it cannot be doubted that the organization of railroads is quite as important to the State as the organization of banks. But it will hardly be questioned that these contracts of the company are objects of taxation within the powers of Congress, and not exempted by any relation to the State which granted the charter of the railroad. And it seems difficult to distinguish the taxation of notes issued for circulation from the taxation of these railroad contracts. Both descriptions of contracts are means of profit to the corporations which issued them ; and both, as we think, may properly be made contributory to the public revenue.



It is insisted, however, that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is, therefore, beyond the constitutional power of Congress.

The first answer to this is that the judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the Constitution.

But there is another answer which vindicates equally the wisdom and the power of Congress.

It cannot be doubted that under the Constitution the power to provide a circulation of coin is given to Congress. And it is settled by the uniform practice of the government and by repeated decisions, that Congress may constitutionally authorize the emission of bills of credit. It is not important here to decide whether the quality of legal tender, in payment of debts, can be constitutionally imparted to these bills; it is enough to say that there can be no question of the power of the government to emit them; to make them receivable in payment of debts to itself; to fit them for use by those who see fit to use them in all the transactions of commerce; to provide for their redemption; to make them a currency, uniform in value and description, and convenient and useful for circulation. These powers, until recently, were only partially and occasionally exercised. Lately, however, they have been called into full activity, and Congress has undertaken to supply a currency for the entire country.

The methods adopted for the supply of this currency were briefly explained in the first part of this opinion. It now consists of coin, of United States notes, and of the notes of the National banks. Both descriptions of notes may be properly described as bills of credit, for both are furnished by the government; both are issued on the credit of the government, and the government is responsible for the redemption of both; primarily as to the first description, and immediately upon default of the bank as to the second. When these bills shall be made convertible into coin, at the will of the holder, this currency will, perhaps, satisfy the

## National Bank v. Commonwealth

wants of the community in respect to a circulating medium, as perfectly as any mixed currency that can be devised.

Having thus, in the exercise of undisputed unconstitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may, constitutionally, secure the benefit of it to the people by appropriate legislation. To this end Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end Congress may restrain, by suitable enactments, the circulation as money of any notes not issued under its own authority. Without this power, indeed, its attempts to secure a sound and uniform currency for the country must be futile.

Viewed in this light, as well as in the other light of a duty on contracts or property, we cannot doubt the constitutionality of the tax under consideration.

The three questions certified from the Circuit Court of the District of Maine must, therefore, be answered

*Affirmatively.*

Mr. Justice NELSON, with whom concurred Mr. Justice DAVIS, delivered a dissenting opinion.

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NATIONAL BANK V. COMMONWEALTH.

(9 Wallace, 353.)

*State taxation of National banks—Construction of statute—Tax “on bank stock”  
Requiring banks to pay the tax.*

Where the capital of a National bank is invested in United States securities it cannot be taxed by the State; but the shareholders of such bank may be taxed, provided the tax is not at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of the State.

A State statute imposed a tax “on bank stock, of fifty cents on each share thereof equal to one hundred dollars of stock therein, owned by individuals, corporations or societies.” Held to be a tax on the shares of the stockholders.

The law further required “the cashier of a bank whose stock is taxed” to pay “the amount of the tax due.” Held valid.

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The implied limitation upon State taxation derived from the express permission to tax shares in the National banking associations, is to be so construed as not to embarrass the imposition or collection of State taxes to the extent of the permission fairly and liberally interpreted.\*

**A**CTION to recover of the First National Bank of Louisville the sum of \$4,000 — that being the amount of tax assessed upon the stock of said bank under the following statute of the State of Kentucky (2 R. S. Stats. 239, 266) laying a tax :

“On bank stock, on stock in any moneyed corporation or loan on discount, fifty cents on each share thereof, equal to one hundred dollars, on each one hundred dollars of stock therein owned by individuals, corporations or societies.”

“The cashier of a bank, whose stock is taxed, shall, on the first day of July in each year, pay into the treasury the amount of tax due. If such tax be not paid, the cashier and his sureties shall be liable for the same, and twenty per cent upon the amount; and the said bank or corporation shall thereby forfeit the privilege of its charter.”

The answer of the defendant alleged the following four grounds of defense :

1. That the bank was not organized under the law of the State, but under the bank act of the United States, and was, therefore, not subject to State taxation.

2. That it had been selected and was acting as a depository and financial agent of the government of the United States, and, therefore, was not liable to any tax whatever, either on the bank, its capital, or its shares.

3. That its entire capital was invested in securities of the government of the United States, and that its shares of stock represented but an interest in the said securities, and were, therefore, not subject to State taxation.

4. That the shares of the stock were the property of the individual shareholders, and that the bank could not be made responsible for a tax levied on those shares, and could not be compelled to collect and pay such tax to the State.

The Commonwealth demurred, and the case resulting in a judgment in its favor in the Court of Appeals, this writ of error was prosecuted by the bank.

The act of Congress establishing the National Bank (13 Stat. at Large, 111) enacted :

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\*See *Thomson v. Pacific Railroad*, 9 Wall. 579, 590.

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"SECTION 40. That the president and cashier of every such association shall cause to be kept a correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, and such list shall be open to the inspection of the officers authorized to collect taxes under State authority.

"SECTION 41. Provided, that nothing in this act shall be construed to prevent all the shares in any of the said associations held by any person, from being included in the valuation of the person of such person, in the assessment of taxes imposed by or under State authority, at the place where such bank is located, and not elsewhere; but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State. Provided, further, that the tax so imposed, under the laws of any State, upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares of any of the banks organized under authority of the State where such association is located."

*Mr. Wills*, for plaintiff in error.

*Mr. Albert Pike*, *contra*.

Mr. Justice MILLER delivered the opinion of the court.

In the several recent decisions concerning the taxation of the shares of the National banks, as regulated by sections 40 and 41 of the act of Congress of June 3d, 1864, it has been established as the law governing this court that the property or interest of a stockholder in an incorporated bank, commonly called a share, the shares in their aggregate totality being called sometimes the capital stock of the bank, is a different thing from the moneyed capital of the bank held and owned by the corporation. This capital may consist of cash, or of bills and notes discounted, or of real estate combined with these. The whole of it may be invested in bonds of the government, or in bonds of the States, or in bonds and mortgages. In whatever it may be invested, it is owned by the bank as a corporate entity, and not by the stockholders. A tax upon this capital is a tax upon the bank, and we have held that when that capital was invested in the securities of the government, it could not be taxed, nor could the corporation be taxed as the owner of such securities.

On the other hand, we have held that the shareholders or stockholders, by which is meant the same thing, may be taxed by the States on stock or shares so held by them, although all the capital of the bank be invested in Federal securities, provided the taxation does not violate the rule prescribed by the act of 1864.

It is not intended here to enter again into the argument by which this distinction is maintained, but to give a clear statement of the propositions that we have decided, that we may apply them to the case before us.

If, then, the tax for which the State of Kentucky recovered judgment in this case is a tax upon the shares of the stock of the bank, and is not a tax upon capital of the bank owned by the corporation, the first, second, and third grounds of defense must fail.

There are, then, but two questions to be considered in the case before us :

1. Does the law of Kentucky, under which this tax is claimed, impose a tax upon the shares of the bank, or upon the capital of the bank, which is all invested in government bonds ?

2. If it is found to be a tax on the shares, can the bank be compelled to pay the tax thus levied on the shares by the State ?

The revenue law of Kentucky imposes a tax "on bank stock, or stock in any moneyed corporation of loan and discount, of fifty cents on each share thereof, equal to one hundred dollars of stock therein, owned by individuals, corporations, or societies."

We entertain no doubt that this provision was intended to tax the shares of the stockholders, and that if no other provision had been made, the amount of the tax would have been primarily collectible of the individual or corporation owning such shares, in the same manner as other taxes are collected from individuals. It is clear that it is the shares owned or held by individuals in the banking corporation which are to be taxed, and the measure of the tax is fifty cents per share of one hundred dollars. These shares may, in the market, be worth a great deal more or a great deal less than their par or nominal value, as its capital may have been increased or diminished by gains or losses, but the tax is the same in each case. This shows that it is the share which is intended to be taxed, and not the cash or other actual capital of the bank.

It is said that there may be, or that there really are, banks in Kentucky whose stock is not divided into shares of one hundred dollars each, but into shares of fifty dollars or other amounts, and that this shows that the legislature did not intend a tax of fifty cents on the share, but a tax on the capital. But the argument is of little weight. What the legislature intended to say was, that we impose a tax on the shares held by individuals or other corporations in banks in this State. The tax shall be at the rate of fifty

cents per share of stock equal to one hundred dollars. If the shares are only equal to fifty dollars, it will be twenty-five cents on each of said shares. If they are equal to five hundred dollars it will be two dollars and fifty cents per share. The rate is regulated so as to be equal to fifty cents on each share of one hundred dollars.

But it is strongly urged that it is to be deemed a tax on the capital of the bank, because the law requires the officers of the bank to pay this tax on the shares of its stockholders. Whether the State has the right to do this we will presently consider, but the fact that it has attempted to do it does not prove that the tax is any thing else than a tax on these shares.

It has been the practice of many of the States for a long time to require of its corporations, thus to pay the tax levied on their shareholders. It is the common, if not the only, mode of doing this in all the New England States, and in several of them the portion of this tax which should properly go as the shareholder's contribution to local or municipal taxation is thus collected by the State, or the bank, and paid over to the local municipal authorities. In the case of shareholders not residing in the State, it is the only mode in which the State can reach their shares for taxation. We are, therefore, of opinion that the law of Kentucky is a tax upon the shares of the stockholder. If the State cannot require of the bank to pay the tax on the shares of its stock, it must, because the Constitution of the United States, or some act of Congress, forbids it. There is certainly no express provision of the Constitution on the subject.

But it is argued that the banks, being instrumentalities of the Federal government, by which some of its important operations are conducted, cannot be subjected to such State legislation. It is certainly true that the Bank of the United States, and its capital, were held to be exempt from State taxation, on the ground here stated, and this principle, laid down in the case of *McCulloch v. Maryland*, 4 Wheat. 316, has been repeatedly affirmed by the court. But the doctrine has its foundation in the proposition, that the right of taxation may be so used in such cases as to destroy the instrumentalities by which the government proposes to effect its lawful purposes in the States, and it certainly cannot be maintained that banks or other corporations or instrumentalities of the government, are to be wholly withdrawn from the operation of

State legislation. The most important agents of the Federal government are its officers, but no one will contend that when a man becomes an officer of the government, he ceases to be subject to the laws of the State. The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions, by which they are designed to serve that government. Any other rule would convert a principle founded alone in the necessity of securing to the government of the United States, the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States. The salary of a Federal officer may not be taxed; he may be exempted from any personal service, which interferes with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the State, which affect his family or social relations, or his property, and he is liable to punishment for crime, though that punishment be imprisonment or death. So of the banks. They are subject to the laws of the State, and are governed in their daily course of business, far more by the laws of the State, than of the Nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional. We do not see the remotest probability of this, in their being required to pay the tax which their stockholders owe to the State for the shares of their capital stock, when the law of the Federal government authorizes the tax.

If the State of Kentucky had a claim against a stockholder of the bank, who was a non-resident of the State, it could undoubtedly collect the claim by legal proceeding, in which the bank could be attached or garnisheed, and made to pay the debt out of the means of its shareholder under its control. This is, in effect, what the law of Kentucky does in regard to the tax of the State on the bank shares. It is no greater interference with the functions of the bank than any other legal proceeding, to which its business

operations may subject it, and it in no manner hinders it from performing all the duties of financial agent of the government.

A very nice criticism of the proviso to the 41st section of the National Bank Act, which permits the States to tax the shares of such bank, is made to us to show that the tax must be collected of the shareholder directly, and that the mode we have been considering is by implication forbidden. But we are of opinion that while Congress intended to limit State taxation to the shares of the bank, as distinguished from its capital, and to provide against a discrimination on taxing such bank shares unfavorable to them, as compared with the shares of other corporations, and with other moneyed capital, it did not intend to prescribe to the State the mode in which the tax should be collected. The mode under consideration is the one which Congress itself has adopted in collecting its tax on dividends, and on the income arising from bonds of corporations. It is the only mode which, certainly and without loss, secures the payment of the tax on all the shares, resident or non-resident; and, as we have already stated, it is the mode which experience has justified in the New England States as the most convenient and proper, in regard to the numerous wealthy corporations of those States. It is not to be readily inferred, therefore, that Congress intended to prohibit this mode of collecting a tax which they expressly permitted the States to levy.

It is said here in argument that the tax is void because it is greater than the tax laid by the State of Kentucky on other moneyed capital in that State. This proposition is not raised among the very distinct and separate grounds of defense set up by the bank in the pleading. Nor is there any reason to suppose that it was ever called to the attention of the Court of Appeals, whose judgment we are reviewing. We have so often of late decided, that when a case is brought before us by writ of error to a State court, we can only consider such alleged errors as are involved in the record, and actually received the consideration of the State court, that it is only necessary to state the proposition now. As the question thus sought to be raised here was not raised in the Court of Appeals of Kentucky, we cannot consider it.

*Judgment affirmed.*



## LIONBERGER V. ROUSE.

(9 Wallace, 468.)

*State taxation of National banks—Discrimination against National banks.*

The proviso in the National Banking Act, that the tax imposed by State laws on shares in National banks "shall not exceed the rate imposed upon the shares in any of the banks organized under the authority of the State, where such association is located," means only that the State, as a condition to the exercise of the power to tax the shares of National banks, shall, as far as it has the capacity, tax in like manner the shares of banks of its own creation.

Where a State has, by contract, disabled itself from taxing its banks of issue beyond a certain amount, but not its banks of discount and deposit; and it lays a tax on all shares of stock in banks and incorporated companies generally,—the fact that it cannot collect the tax, beyond the amount limited, of the banks of issue, is no bar to the collection of the tax on the shares of National banks for a greater amount.

**E**RROR to the Supreme Court of Missouri. Prior to 1857, there had been, in Missouri, several banking institutions which received deposits, lent money, and dealt in exchange; but which had not the privilege of issuing notes to circulate as money; not, therefore, banks of issue.

In that year the State established ten banks, which were banks of issue. The act establishing the ten banks of issue declared that

"Each banking company (incorporated under it) agrees to pay to the State annually one per cent on the amount of capital stock paid in by the stockholders other than the State, which shall be in full of all bonus and taxes to be paid to the State by the respective banks."

Of these ten banks of issue eight became National banks under the act of 1864. Two, however, did not. These two remained State institutions with the privilege of the one per cent, as before. The old associations, that is to say the banks not of issue, all of which had charters independently of the act of 1857, and which had not the privilege to pay one per cent in lieu of all other taxes, remained State institutions.

The legislature of Missouri, by an act of the 4th February, 1864, concerning revenue, provided that "shares of stock in banks and

other incorporated companies" should be subject to assessment as other property. The statute provided the mode of assessment as follows :

"Persons owning shares in banks and other incorporated companies, taxable by law, are not required to deliver to the assessor a list thereof; but the president or other chief officer of such corporation shall deliver to the assessor, a list of all shares of stock held therein, and the names of the persons who hold the same.

"The tax assessed on shares of stock, embraced in said list, shall be paid by the corporations respectively, and they may recover from the owners of such shares the amount so paid by them, or deduct the same from dividends accruing on such shares."

Under this act, a tax of nearly two per cent was levied by the State on the assessed valuation of the shares of one Lionberger, a resident of St. Louis, and a shareholder in the Third National Bank of St. Louis. Payment of the tax being refused, the collector, a certain Rouse, collected it forcibly. Lionberger thereupon brought suit against him, in one of the State courts, for the alleged wrongful act; asserting that the proviso in the 41st section of the act of 1864, imposing a limitation on the power of the States, had reference to banks of issue alone; that the State had disabled itself by its contract with them to tax that sort of bank otherwise than it had contracted for (one per cent), and that the assessment and collection, if made under color of law, were without any legal authority whatever. It was not denied that the two State banks of issue held a very inconsiderable portion of the banking capital of the State, and that the shares of all other associations in the State (of which there were many, some created after 1857, and some before), with all the privileges of banking except the power to emit bills, were taxed like the shares in National banks. The court in which the suit was brought decided adversely to the position set up, and on appeal the Supreme Court of the State—observing that the moneyed associations, saving and banking institutions of the State, were banks to all intents and purposes, and that their shareholders were taxed at the same prescribed rate as the shareholders in the National institutions—affirmed the decision. The case was now brought here for review. Many shareholders in the National banks in Missouri had also refused to pay the tax laid under the State statute, and the present case was in the nature of

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a test case to settle its validity ; more than \$300,000 of such taxes, as was said, being dependent on the judgment.

*Messrs. Evarts and Broadhead*, for plaintiff in error.

*Messrs. Blair and Dick*, *contra*.

Mr. Justice DAVIS delivered the opinion of the court.

This case has received the careful consideration of the court, as well on account of the principle involved, as of the large amount of money dependent on the decision of the suit.

It is no longer an open question in this court, since the decision in the case of *Van Allen v. The Assessors*, 3 Wallace, 573,\* that the shareholders in a National bank are subject to State taxation, although the entire capital of the bank be invested in the bonds of the United States, which cannot be taxed by State authority. The difficulties which have arisen since that decision do not relate to the abstract right of taxation, but grow out of the supposed conflict of State legislation with the provisions of the act of Congress on the subject. The forty-first section of the act of Congress of 3d of June, 1864 (13 Statutes at Large, 111), placing these shares within the reach of the taxing power of the States, annexed two conditions to the exercise of the power. The State was forbidden to tax them higher than it taxed other moneyed capital in the hands of its own citizens, or to impose on them a tax exceeding the rate imposed upon the shares in any of the banks organized under State authority. If there was no discrimination in these particulars, the State could lawfully tax shares in the National banks. It is conceded the tax exacted from the plaintiff in error was not greater than was assessed on other moneyed capital belonging to individuals or corporations, but it is claimed that it is higher than the rate paid by the State banks.

And this brings us to the consideration of the main question in the case. It is contended that the tax in question is invalid, because the two State banks chartered in 1857 which did not, like the remaining eight, become National banks, cannot be taxed more highly than one per cent, while the assessment of the shares of the plaintiff in error equals nearly two per cent. It is not denied that these two banks hold a very inconsiderable portion of the bank-

ing capital of the State, and that the shares of all other associations in the State (there being many), with all the privileges of banking except the power to emit bills, are taxed like the shares in National banks, but it is claimed the proviso in the forty-first section of the National Banking Act, imposing a limitation on the power of the States, has reference alone to banks of issue. To ascertain the sense in which the word "bank" is used in the proviso to this section, it is necessary to recur to the mischief which Congress desired to guard against. The National banks were established to provide a National currency, at a time when the State banks furnished the entire paper circulation of the country. In providing a system by which the States, where National banks were located and did business, could tax their shares, it was important, as their notes came in competition with State bank paper, that there should be no unfavorable discrimination against them. It was easy to see that an unfriendly State could legislate so as to drive them out of circulation, and this consideration induced Congress to limit the State power of taxation in two particulars. In declaring that National bank shares should be taxed like other moneyed capital, and that no burdens should be imposed on them from which State banks were exempt, all was done that the necessity of the case required. There was nothing to fear from banks of discount and deposit merely, for in no event could they work any displacement of National bank circulation. It seems, therefore, clear that the proviso to the forty-first section was meant by Congress to apply to banks of issue. It is proper in this connection to observe that the changed condition of the banking interests of the country has been the occasion of further legislation by Congress on this subject, and that now the power of State taxation over the shares of National banks is subject only to the restriction that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens. 15 Statutes at Large, p. 34.

Having determined that Congress, in imposing conditions on the power of the State to tax, had reference to banks of circulation, the question arises whether the tax in this case was invalid because of the status of the two banks left in Missouri. According to the words of the law the tax was not warranted, but did Congress intend that the law should have such an effect? Did it contemplate that the shares of National banks should escape taxation, if the

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State complied, so far as it had the ability to do so, with the requirements of the forty-first section of the National Banking Act? In our opinion the answers to these inquiries must be in the negative. It is a universal rule in the exposition of statutes that the intent of the law, if it can be clearly ascertained, shall prevail over the letter, and this is especially true where the precise words, if construed in their ordinary sense, would lead to manifest injustice. Dwarris on Statutes, chap. 12; *Perry v. Skinner*, 2 Mees. & Wels. 471; *Stocker v. Warner*, 1 C. B. 149.

It is very clear that Congress, in conceding to the States the right to tax, adopted a measure which it was supposed would operate to restrain them from legislating adversely to the interests of the National banks. The measure itself had reference to prospective legislation by the States, and its object was accomplished when the States conformed, so far as practicable, their revenue systems to it. Each conformity was required, if attainable, but the law-making power did not intend such an absurd thing, as that the power of the State to tax should depend on its doing an act, which it had obliged itself not to do. It was well known at the time, and Congress must be supposed to have legislated on this subject with reference to it, that States, by contract with individuals or corporations, could grant away the right of taxation, and that this power had been frequently exercised. It was equally within the knowledge of Congress that the policy on this subject varied in different States; while some of them retained in their own hands the power of taxation over all species of property, except such as were devoted to religious or charitable purposes, others had parted with it to interests of a purely business character, like banks and railroads. Can it be supposed that Congress, in this condition of things in the country, meant to confer a privilege by one section of a law which by another it made practically unavailable? If the construction contended for by the plaintiff in error be allowed, then a State so unfortunate as to have a single bank, whose shareholders are exempt by contract from taxation in the manner provided by Congress, can derive no benefit from the power given to tax the shares of National banks. And this further consequence would follow, that the shareholders of National banks located in one State would escape all taxation, while those whose property was invested in banks in a different locality would have to contribute their full share of the public burdens. This court will not impute to Con-

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gress a purpose that would lead to such manifest injustice, in the absence of an express declaration to that effect. Without pursuing the subject further, it is enough to say, in our opinion, Congress meant no more by the second limitation in the proviso to the forty-first section of the National Banking Act, than to require of each State, as a condition to the exercise of the power to tax the shares in National banks, that it should, as far as it had the capacity, tax in like manner the shares of banks of issue of its own creation.

Testing the case in hand by this rule, it is apparent that the tax complained of was properly assessed and collected. Missouri has complied, so far as it had the ability to do it, with the demands of the law.

The legislature, as soon as the National banking system was created, passed a law enabling the ten banks of issue in the State to wind up their business, in order that their shareholders could, if they chose, transfer their interests to the new system. Eight of these banks availed themselves of the privilege, surrendered their charters as State corporations, and became National bank associations. Two of them declined the proposition tendered by the State, and are still doing business in St. Louis. There is no way the State could compel them to relinquish their charters, nor has it the power to tax their stockholders on their shares of stock. Having contracted with these banks to accept from them annually, in lieu of all taxes, one per cent, on their paid-in capital stock, it cannot turn around and assess a tax on the shareholders. As the State did all that it could to conform its legislation to the requirements of the law, it was therefore in a condition to impose the tax in question on the shares of stock held by the plaintiff in error.

It is objected that the mode of assessment provided by the general revenue law of the State is inconsistent with the provisions of the act of Congress of June 3d, 1864, as it requires the tax assessed on the shares of stock, to be paid by the corporations respectively, instead of the individual shareholders. This was one of the questions in the case of the *National Bank v. Commonwealth*, decided at this term, *supra*, 34, and it was there held that this mode of assessment was not inconsistent with the terms of the law, but in all respects unobjectionable. It is unnecessary to repeat the argument presented in that case, or to consider the point further, as we see no reason to question the soundness of that decision.

*Judgment affirmed.*

## MERCHANTS' NATIONAL BANK v. STATE NATIONAL BANK.

(10 Wallace, 604.)

*Certified checks — Power of cashier to certify — Place of business of banks.*

A certificate of a bank that a check is good is equivalent to an acceptance; it implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. (*See note, p. 61.*)

National banks have the power to certify checks, and this power may be exercised by the cashier without special authorization. The directors may limit his exercise of this power as they deem proper, but such limitation will not affect a person ignorant thereof who deal with the cashier in relation to matters apparently within the scope of his power.\* (*See note, p. 61.*)

The provision of the National Bank Act requiring "the usual business" of the banks to be transacted "at an office or banking-house in the place specified in its organization certificate," does not prevent the purchase of coin by one bank at the banking-house of another.

M. and S., who was cashier of defendants' bank, went to plaintiffs' bank and bought gold, paying for it by M.'s checks on defendants' bank, which S., as such cashier, certified to be "good." The defendants' bank refused to pay the checks, alleging that the cashier had no authority to certify them. It was not shown what became of the gold. Both banks had power to buy and sell coin; and defendants' by-laws conferred upon their cashier large general powers, although the power to certify checks or to buy gold was not specifically mentioned. Cashiers of other banks in the same locality testified that they exercised the same powers, and were authorized to borrow and lend the moneys of their bank of and to each other, and to pledge the credit of their banks; and that these transactions were uniformly conducted on the faith of the cashier's implied powers. There was no proof that either S. or any of them had ever certified checks or purchased gold. *Held*, 1. That if the gold actually went into defendant's bank, the bank was liable for money had and received, irrespective of the cashier's authority.

\* The present Revised Statutes of the United States enact as follows:

"Sec 5208. It shall be unlawful for any officer, clerk, or agent of any National banking association to certify any check drawn upon the association unless the person or company drawing the check has on deposit with the association, at the time such check is certified, an amount of money equal to the amount specified in such check.

Any check so certified by duly authorized officers shall be a good and valid obligation against the association; but the act of any officer, clerk, or agent of any association, in violation of this section, shall subject such bank to the liability and proceedings on the part of the Comptroller as provided for in section fifty-two hundred and thirty-four."

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2. If it did not, it was a question for the jury under the evidence of the powers exercised by the cashier and the usages of banks, whether his power to bind the bank by his contract might not fairly be inferred, applying the rule that where an innocent party deals with a corporation unaware of any defect in its agent's authority, and there is nothing to excite suspicion, if the contract can, in fact, be valid under any circumstances, the party has a right to presume their existence, and the corporation is estopped to deny it.

**E**RROR to the Circuit Court for the District of Massachusetts, in an action by the Merchants' National Bank against the State National Bank, upon three checks of Mellen, Ward & Co., amounting to \$600,000, drawn on the latter bank and marked "good" by its cashier. The opinion of the court states the facts.

*Messrs. S. Bartlett, J. G. Abbott and William M. Evarts*, for the plaintiff in error, the Merchants' National Bank.

*Messrs. B. R. Curtis, C. B. Goodrich and B. F. Thomas*, contra.

Mr. Justice SWAYNE delivered the opinion of the court.

This is a writ of error to the Circuit Court of the United States for the District of Massachusetts. The plaintiff in error was the plaintiff in the court below. It appears, by the bill of exceptions, that upon the evidence in behalf of the plaintiff being closed, the defendants' counsel moved the court to instruct the jury that it was not sufficient to warrant them to find a verdict for the plaintiff upon either of the counts in the declaration. This instruction was given. The jury found for the defendant. The plaintiff excepted, and has brought that instruction here for review. This renders it necessary to examine the entire case as presented in the record. According to the settled practice in the courts of the United States, it was proper to give the instruction of it here clear that the plaintiff could not recover. It would have been idle to proceed further when such must be the inevitable result. The practice is a wise one. It saves time and costs; it gives the certainty of applied science to the results of judicial investigation; it draws clearly the line which separates the provinces of the judge and the jury, and fixes where it belongs the responsibility which should be assumed by the court. The facts disclosed in the bill of exceptions are neither numerous nor complicated. The defendant called no witnesses. There is no conflict in the testimony. The questions which it is our duty to examine are questions of law. None are made upon the pleadings, and it is unnecessary to consider



them. It is sufficient to remark, that the declaration is so framed as to meet the case in every legal aspect which it can assume.

On the 26th of February, 1867, Fuller, the plaintiff's cashier, received from the Second National Bank of Boston \$200,000 of gold certificates, and paid the bank, upon their delivery, the amount of their face and a premium of twenty-five per cent. Payment was made in currency and legal tender notes. The next day he received from the same bank \$200,000 more of like certificates, and paid for them at the same rate in currency and a ticket of credit by the Merchants' Bank in favor of the National Bank for \$175,000. Both transactions were pursuant to an arrangement with Mellen, Ward & Co., brokers in Boston. The market premium upon gold at that time was 40 per cent. It was understood between Fuller, the cashier, and Mellen, Ward & Co., that the latter might receive the same amount of gold from the Merchants' Bank at any time thereafter by paying the amount advanced, compensation for the trouble the bank had incurred, and interest at the rate of six per cent. There had been like transactions upon those terms between the parties prior to that time. The president of the bank was consulted in advance as to both the purchases from the Second National Bank, and approved them. The following testimony is taken from the record:

"George H. Davis testified as follows: I am the paying teller of the Merchants' Bank. From about the 1st of January, 1867, and previous to the 23d of February, the bank several times received gold, or gold certificates from Mellen, Ward & Co., for which it paid currency at the rate of \$125 for \$100 in gold. At that time they had deposited in the bank about \$90,000 in gold. No note, memorandum, or check was taken connected with it in any way. The gold was added to the gold of the bank; on my cash book it was added to the item of gold, and the gold was mixed with the gold of the bank in the vault. If it consisted of certificates, they were put in a pocketbook kept in my trunk with other certificates and bills. The paying teller's book was put in, and from the entries in it on the 26th, 27th, and 28th of February, 1867, it appeared that the gold received from Mellen, Ward & Co. was added to the gold of the bank."

On the 28th day of February, Carter, of the firm of Mellen, Ward & Co., and Smith, the cashier of the State Bank, called to-

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gether at the Merchants' Bank. Carter said to Fuller, "We have come in for gold." Smith, the cashier, said, "We have come to get an amount of gold," and that he would "pay for it by certifying these checks," referring to two papers which Carter held in his hand. The teller handed Fuller 84 gold certificates of \$5,000 each, making the sum of \$420,000. Fuller announced the amount. Smith said that was the amount wanted, and the amount covered by the checks. He received the certificates, certified the checks, and handed them over to the plaintiff's cashier. They were drawn by Mellen, Ward & Co., upon the State National Bank in favor of Fuller, the plaintiff's cashier, or order, and were certified "Good; C. H. Smith, cashier." One was for \$250,000, and the other for \$275,000. Smith thereupon left the bank with the certificates in his possession. Nothing was said by Fuller to Carter, or by Carter to Fuller, in relation to the checks, and Fuller did not know what checks Smith referred to until they were delivered to him. Smith did not certify or deliver the checks until he had got possession and control of the funds upon which his certificates were apparently founded, and this was known to the plaintiff's agent when he received the checks. Later on the same day Smith and Carter called again at the Merchants' Bank. Fuller was absent. Smith received \$60,000 more of gold and gold certificates from the teller, and gave in return a check for \$75,000, drawn by Mellen, Ward & Co. on the State Bank, payable to "gold or bearer." Like the two previous checks, it was certified "Good; C. H. Smith, cashier." This arrangement was in pursuance of the same agreement as that under which the gold certificates were delivered in the earlier part of the day. Both transactions were alike within its scope.

On the first of March Havens, the president of the Merchants' Bank, called at the State Bank and complained that Smith had not paid the checks. Smith said he was going out to get the money. Havens inquired, "Didn't you have the money—the gold? Were not gold certificates delivered to you?" He answered, "Yes; I had them here, but they are not here now. I am going out to get it, and will come in and attend to it." Subsequently, in the same conversation, he said, "You hold the State Bank." Later in the day Havens called upon Stetson, the president of the State Bank. Stetson denied that Smith was authorized to certify the checks, and appealed to a director who was present. The director was silent. In an account which Fuller rendered to Mellen, Ward &

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Co., after their failure, showing the disposition of various collaterals which Mellen, Ward & Co. had deposited from time to time with the Merchants' Bank, the amount paid for gold was put down as a loan, and interest was charged, but in his testimony before the jury he denied that the money was loaned, and insisted that the gold was bought by the Merchants' Bank. The agreement between Mellen, Ward & Co., and the Merchants' Bank rested wholly in parol. No written voucher was given or received on either side touching any of the transactions between the parties. The record discloses nothing else in this connection which is material to consider..

The State Bank was organized under the act of Congress "to provide a National currency," etc, of the 3d of June, 1864 (13 Stat. at Large, 99). The eighth section of that act authorizes such associations, by their directors, to appoint a cashier and other officers, and to exercise, "under this act, all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits, by buying and selling exchange, coin, and bullion; by loaning money on personal security; by obtaining, issuing, and circulating notes, according to the provisions of this act," etc. It is further provided that the directors may, by by-laws, regulate the manner in which its business shall be conducted and its franchises enjoyed; and that its general business shall be transacted at an office "located in the place specified in its organization certificate."

The 5th of the articles of association authorizes the board of directors to appoint a cashier and such other officers as may be necessary, and to define their duties. The 7th by-law declares that the cashier "shall be responsible for the moneys, funds, and other valuables of the bank, and shall give bond," etc. The 17th by-law requires that all "contracts, checks, drafts, receipts, etc., shall be signed by the cashier or by the president, and that all indorsements necessary to be made by the bank shall be under the hand of the cashier or president," unless absent.

The by-laws contain nothing further upon this subject. The directors failed to define more specifically the powers and duties of the cashier.

Smith, the defendant's cashier, exercised habitually very large powers without any special delegation of authority. An account

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was kept on the books of the bank with him as cashier, which represented these transactions, and printed blank checks were kept in the bank to facilitate them. The checks given by him for the proceeds of bills discounted and for the purchase of exchange during the five months preceding the 23d of February, 1867, amounted in the aggregate to two and a half million of dollars. This was exclusive of his clearing-house checks. His checks for money borrowed of other banks, during the six months preceding the same 23d of February, amounted to one million five hundred and forty-seven thousand dollars. A large number of the cashiers of other banks, in Boston, were examined, and testified that they exercised the same powers under like circumstances. There is no proof that either they or Smith ever certified checks. It is not shown what became of the gold. Perhaps some light is thrown on the subject by the remark of the president of the Merchants' Bank to the president of the State Bank, "that the latter had better go to the sub-treasury, and that he would perhaps find his gold there." We find no reason to doubt that both banks, as represented by their cashiers, acted in entire good faith throughout the transactions, until they were closed by the delivery of the last of the certified checks. Neither could then have anticipated the difficulties and the conflict which subsequently arose.

The first question presented for our consideration is, what was the title of the plaintiff, and what were the rights of Mellen, Ward & Co., in respect to the gold certificates delivered by the Second National Bank to the Merchants' Bank? No very searching analysis of the facts disclosed is necessary to enable us to find a satisfactory answer to this inquiry. It does not appear that Mellen, Ward & Co. had any connection with the certificates received from the Second National Bank until after the plaintiff took the action which they invoked, and came into possession of the property.

The Merchants' Bank applied for them, bought them, paid for them, received them, and deposited them with its other assets of like character. It does not appear that any special mark was put upon them, or that any thing was done to distinguish them from the other effects of the bank in which they were mingled. Upon the face of the transaction it was a simple sale by the Second National Bank, whereby the entire title and property became vested in the plaintiff. But gold was then at a premium of 40 per cent in currency. The Merchants' Bank paid

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but 25, according to the contract between the bank and Mellen, Ward & Co. The latter were to pay, and it is to be presumed did pay the additional 15 per cent.

This was a part of the consideration upon which the Merchants' Bank entered into the contract. It is evident that the bank did not agree to deliver to Mellen, Ward & Co. the identical gold certificates which were purchased, but gold, or its equivalent in certificates to the same amount, and any gold or any certificates would have satisfied the contract. The bank cannot, therefore, be regarded as holding the certificates in pledge. The want of the element, that the identical certificates were to be delivered, is conclusive against that view of the subject. If Mellen, Ward & Co. had tendered performance and called for gold, and the bank had failed to respond, Mellen, Ward & Co. could have sustained an action for the breach of the contract. But they could not have maintained *detinue*, *trover*, or *replevin* against the bank. The real character of the transaction was, that the bank took the title and entire property, but Mellen, Ward & Co. had the right to purchase from the bank the like amount of gold or its equivalent in certificates, according to the terms of the contract, which were that they should pay what the bank paid, compensation for its trouble and interest from the time the purchase by the bank was made.

In respect to the \$60,000 of gold and gold certificates delivered by the teller in the absence of the cashier, and excess of gold certificates over \$400,000 delivered by the cashier, the facts are substantially the same as those in regard to the \$400,000, except that the excess of certificates, and what was delivered by the teller, had reference to gold and gold certificates deposited in the bank by Mellen, Ward & Co. This difference is not material. With this qualification the same remarks apply which have been made touching the \$400,000 of certificates, and we are led to the same legal conclusions.

The transactions between the State Bank and the Merchants' Bank were apparently of the same character as that between the Merchants' Bank and the Second National Bank. What the understanding between Mellen, Ward & Co. and the defendant was is not disclosed in the evidence. But it is fairly to be inferred that it was the same as that between them and the Merchants' Bank. When the arrangement was proposed by Carter to Fuller on the 22d of February, Carter said that "when the gold was taken from

the Merchants' Bank he thought it would go through some other bank or banks." The assent of Mellen, Ward & Co. to the sale to the State Bank by the Merchants' Bank extinguished their claim upon the latter. The Merchants' Bank certainly had a title of some kind, and whatever it was it passed to the State Bank, unless the contract was void, because the State Bank had no corporate power, or its cashier had no authority to make the purchase. The act of Congress expressly authorizes the banks created under it to buy and sell coin. No question of *ultra vires* is therefore involved.

If the Merchants' Bank held the certificates as a pledge it had a special property which might be sold and assigned. The assignee in such cases becomes invested with all the legal rights which belonged to the assignor. Such is the rule of the common law, and it has subsisted from an early period. *Mores v. Conham*, Owen, 123; *Anon.*, 2 Salkeld, 522; *Coggs v. Bernard*, 3 id. 268; *Whitaker v. Sumner*, 20 Pickering, 399, 405; *Thompson v. Patirick*, 4 Watts, 415; Story on Bailments, § 324.

But we are entirely satisfied with the other view we have expressed upon the subject. *Modus et conventio vincunt legem*.

It is insisted by the defendants' counsel that the transaction was a loan to Mellen, Ward & Co. As the bank parted with its title, if there were a loan in the eye of the law, it would not in any wise affect the conclusions at which we have arrived.

Recurring to the subject of the authority of the cashier of the State Bank to make the purchase and excluding from consideration for the present the certified checks, three views, we think, may be properly taken of the case in this aspect:

1. If the certificates and the gold actually went into the State Bank, as was admitted by Smith to Havens, then the bank was liable for money had and received, whatever may have been the defect in the authority of the cashier to make the purchase, and this question should have been submitted to the jury.

2. It should have been left to the jury to determine whether, from the evidence as to the powers exercised by the cashier, with the knowledge and acquiescence of the directors, and the usage of other banks in the same city, it might not be fairly inferred that Smith had authority to bind the defendant by the contract which he made with the Merchants' Bank.

3. Where a party deals with a corporation in good faith—the transaction is *ultra vires*—and he is unaware of any defect of author-

ity or other irregularity on the part of those acting for the corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such defect or irregularity in fact exists.

If the contract can be valid under any circumstances, an innocent party in such a case has a right to presume their existence, and the corporation is estopped to deny them.

The jury should have been instructed to apply this rule to the evidence before them.

The principle has become axiomatic in the law of corporations, and by no tribunal has it been applied with more firmness and vigor than by this court. *Supervisors v. Schenck*, 5 Wall. 772; *Knox Co. v. Aspinwall*, 21 How. 539; *Bissell v. Jeffersonville*, 24 id. 288; *Moran v. Commissioners*, 2 Black, 722; *Gelpcke v. Dubuque*, 1 Wall. 203; *Mercer Co. v. Hackett*, id. 93; *Mayor v. Lord*, 9 id. 414; *Royal British Bank v. Turquand*, 6 Ellis & Blackburn, Q. B. & Ex. 327; *The Farmers' Loan and Trust Co. v. Curtis*, 3 Selden, 466; *Stoney v. American Life Ins. Co.*, 11 Paige, 635; *Society for Savings v. New London*, 29 Conn. 174; *Commonwealth v. City of Pittsburg*, 34 Penn. St. 497; *Commonwealth v. Allegheny County*, 37 id. 287.

Corporations are liable for every wrong of which they are guilty, and in such cases the doctrine of *ultra vires* has no application. *Philadelphia & Baltimore Railroad Co. v. Quigley*, 21 How. 209; *Green v. London Omnibus Co.*, 7 C. B. (N. S.) 290; *Life and Fire Ins. Co. v. Mechanics' Fire Ins. Co.*, 7 Wend. 31.

Corporations are liable for the acts of their servants while engaged in the business of their employment in the same manner and to the same extent that individuals are liable under like circumstances. *Ranger v. The Great Western Railway Co.*, 5 House of Lords Cases, 86; *Thayer v. Boston*, 19 Pick. 511; *Frankfort Bank v. Johnson*, 24 Me. 490; *Angell & Ames on Corporations*, §§ 382, 388.

Estoppel *in pais* presupposes an error or a fault and implies an act in itself invalid. The rule proceeds upon the consideration that the author of the misfortune shall not himself escape the consequences and cast the burden upon another. *Swan v. The British North Australian Co.*, 7 Hurlstone & Norman, 603; *Hern v. Nichols*, 1 Salkeld, 289. Smith was the cashier of the State Bank. As such he approached the Merchants' Bank. The bank did not approach him. Upon the faith of his acts and declarations it

parted with its property. The misfortune occurred through him, and as the case appears on the record, upon the plainest principles of justice the loss should fall upon the defendant. The ethics and the law of the case alike require this result. *Dezell v. Odell*, 3 Hill, 216.

Those who created the trust appointed the trustee and clothed him with the power that enabled him to mislead, if there were any misleadings, ought to suffer rather than the other party. *Farmers and Mechanics' Bank of Kent Co. v. Butchers and Drovers' Bank*, 16 N. Y. 133; *Welland Canal Co. v. Hathaway*, 8 Wendell, 480.

In the *Bank of the United States v. Davis*, 2 Hill, 465, NELSON, Chief Justice, said: "The plaintiffs appointed the director and held him out to their customers and the public as entitled to confidence. They placed him in a position where he has been enabled to commit this fraud."

The director has fraudulently appropriated the proceeds of a bill discounted for the drawer. It was held the drawer was not liable.

The reasoning of Justice SELDEN in the *Farmers and Mechanics' Bank of Kent County v. The Butchers and Drovers' Bank*, *supra*, is also strikingly apposite in the case before us. He said: "The bank selects its teller and places him in a position of great responsibility. Persons having no voice in his selection are obliged to deal with the bank through him. If, therefore, while acting in the business of the bank and within the scope of his employment, so far as is known or can be seen by the party dealing with him, he is guilty of misrepresentation, ought not the bank to be responsible?"

The same principle was applied in the *New York and New Haven Railroad Co. v. Schuyler*, 38 Barb. S. C. 536; S. C. affirmed, 34 N. Y. 30.

It was explicitly laid down by Lord HOLT, in *Hern v. Nichols*, 1 Salkeld, 289. He there said: "For seeing somebody must be a loser by this deceit, it is more reason that he that employs and puts trust and confidence in the deceiver should be a loser than a stranger, and upon this the plaintiff had a verdict."

Smith, by his conduct, if not by his declaration, avowed his authority to buy the certificates and gold in question from the Merchants' Bank, and the bank, under the circumstances, had a right to believe him.



We have thus far examined the controversy as if the certified checks were void or had not been given. It remains to consider that branch of the case. Bank checks are not inland bills of exchange, but have many of the properties of such commercial paper; and many of the rules of the law merchant are alike applicable to both. Each is for a specific sum payable in money. In both cases there is a drawer, a drawee, and a payee. Without acceptance, no action can be maintained by the holder upon either against the drawer.\* The chief points of difference are that a check is always drawn on a bank or banker. No days of grace are allowed. The drawer is not discharged by the laches of the holder in the presentment for payment, unless he can show that he has sustained some injury by the default. It is not due until payment is demanded, and the statute of limitation runs only from that time. It is by its face the appropriation of so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer. It is not necessary that the drawer of a bill should have funds in the hands of the drawee. A check in such a case would be a fraud. Grant on Banking, 89, 90; *Keen v. Beard*, 8 C. B. (N. S.) 373; *Serle v. Norton*, 2 Moody & Robinson, 404, n.; *Boehm v. Sterling*, 7 Tenn. 430; *Alexander v. Berchfield*, 7 Manning & Granger, 1067.

All the authorities, both English and American, hold that a check may be accepted, though acceptance is not usual. *Robson v. Bennett*, 2 Taunton, 395; Grant on Banking, 89; Chitty on Bills (10th ed.), 261; *Boyd v. Emmerson*, 2 Adolphus and Ellis, 184; *Kilsby v. Williams*, 5 Barnewall and Alderson, 816; Story on Promissory Notes, §§ 489, 490. By the law merchants of this country, the certificate of the bank that a check is good is equivalent to acceptance. It implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then and shall continue good, and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume. The object of certifying a check, as regards both parties, is to enable the holder to use it as money. The transferee takes it with the same readiness and sense of security that he would take the notes of the bank. It is available also to him for all the purposes of money. Thus it continues to perform its important functions

until in the course of business it goes back to the bank for redemption and is extinguished by payment.

It cannot be doubted that the certifying bank intended these consequences, and it is liable accordingly. To hold otherwise would render these important securities only a snare and delusion.

A bank incurs no greater risk in certifying a check than in giving a certificate of deposit. In well-regulated banks the practice is at once to charge the check to the account of the drawer, to credit it in "a certified check account," and when the check is paid, to debit that account with the amount. Nothing can be simpler or safer than this process.

The practice of certifying checks has grown out of the business needs of the country. They enable the holder to keep or convey the amount specified with safety. They enable persons not well acquainted to deal promptly with each other, and they avoid the delay and risks of receiving, counting, and passing from hand to hand large sums of money.

It is computed by a competent authority that the average daily amount of such checks in use in the city of New York, throughout the year, is not less than one hundred millions of dollars.

We could hardly inflict a severer blow upon the commerce and business of the country than by throwing a doubt upon their validity.

Our conclusions as to their legal effect are supported by authorities of great weight. *Bickford v. First National Bank*, 42 Ill. 238; *Willeys v. Phoenix Bank*, 2 Duer, 121; *Barnet v. Smith*, 10 Foster (N. H.), 256; *Meads v. Merchants' Bank*, 25 N. Y. 146; *Farmers and Mechanics' Bank v. Butchers and Drovers' Bank*, 4 Duer, 219; affirmed, 14 N. Y. 624; *Brown v. Leckie et al.*, 43 Ill. 497; *Girard Bank v. Bank of Penn Township*, 39 Penn. St. 92.

Congress has made them the subject of taxation by name. 13 Stat. at Large, 278.

But it is strenuously denied that the cashier has authority to certify the checks in question. To this there are two answers:

1. In considering the question of his authority to buy the gold, the evidence that he had given his checks for loans to his bank, and for the proceeds of discounts, was fully considered. Our reasoning and the authorities cited upon that subject apply here with equal force. We need not go over the same ground again. The questions whether the requisite authority was not inferable, and

whether the principle of estoppel *in pais* did not apply, should in this connection also have been left to the jury.

2. As before remarked, the organic law expressly allowed the bank to buy coin and bullion. We have also adverted to the provisions of the by-laws, that the cashier shall be responsible "for the moneys, funds, and all other valuables of the bank;" and that "all contracts, checks, drafts, receipts, etc., shall be signed either by the cashier or president." The power of the bank to certify checks had also been sufficiently examined. The question we are now considering is the authority of the cashier. It is his duty to receive all the funds which come into the bank, and to enter them upon its books. The authority to receive implies and carries with it authority to give certificates of deposit and other proper vouchers. Where the money is in the bank he has the same authority to certify a check to be good, and charge the amount to the drawer, appropriate it to the payment of the check, and make the proper entry in the books of the bank. This he is authorized to do, *virtute officii*. The power is inherent in the office. *Wild v. The Bank of Passamaquoddy*, 3 Mason, 506; *Burnham v. Webster*, 19 Me. 234; *Elliot v. Abbott*, 12 N. H. 549; *Bank of Vergennes v. Warren*, 7 Hill, 91; *Lloyd v. The West Branch Bank*, 15 Penn. St. 172; *Badger v. The Bank of Cumberland*, 26 Me. 428; *Bank of Kentucky v. The Schuylkill Bank*, 1 Pars. Select Cases, 182; *Fleckner v. Bank of the United States*, 8 Wheat. 360.

The cashier is the executive officer, through whom the whole financial operations of the bank are conducted. He receives and pays out its moneys, collects and pays its debts, and receives and transfers its commercial securities. Tellers and other subordinate officers may be appointed, but they are under his direction, and are, as it were, the arms by which designated portions of various functions are discharged. A teller may be clothed with the power to certify checks, but this in itself would not affect the rights of the cashier to do the same thing. The directors may limit his authority as they deem proper, but this would not affect those to whom the limitation was unknown. *Commercial Bank of Lake Erie v. Norton et al.*, 1 Hill, 501; *Bank of Vergennes v. Warren*, 7 id. 94; *Beers v. Phoenix Glass Company*, 14 Barb. 358; *Farmers and Mechanics' Bank v. Butchers and Drovers' Bank*, 14 N. Y. 624; *North River Bank v. Aymar*, 3 Hill, 262, 268; *Barnes v. Ontario Bank*, 19 N. Y. 156, 166.

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The foundation upon which this liability rests was considered in an earlier part of this opinion. Those dealing with a bank in good faith have a right to presume integrity on the part of its officers, when acting within the apparent sphere of their duties, and the bank is bound accordingly.

In *Barnes v. The Ontario Bank*, 19 N. Y. 156, the cashier had issued a false certificate of deposit. \*In the *Farmers and Mechanics' Bank v. Butchers and Drovers' Bank*, 14 N. Y. 624; S. C., 16 N. Y. 133, and in *Meads v. The Merchants' Bank of Albany*, 25 N. Y. 146, the teller had fraudulently certified a check to be good. In each case the bank was held liable to an innocent holder.

It is objected that the checks were not certified by the cashier at his banking-house. The provisions of the act of Congress as to the place of business of the banks created under it must be construed reasonably. The business of every bank, away from its office — frequently large and important — is unavoidably done at the proper place by the cashier in person, or by correspondents or other agents. In the case before us, the gold must necessarily have been bought, if at all, at the buying or the selling bank, or at some third locality. The power to pay was vital to the power to buy, and inseparable from it. There is no force in this objection. *Bank of Augusta v. Earle*, 13 Pet. 519; *Pendleton v. Bank of Kentucky*, 1 T. B. Monroe, 182.

It is also objected that each of the checks, after being certified, required an additional stamp. The act of Congress relating to the subject directs certified checks to be included in the circulation of the bank for the purpose of taxation. 13 Stat. at Large, 278, ch. 173, § 110. This is a conclusive answer to the objections.

In *Brown v. London*, 1 Levinz, 298, judgment in a suit upon two accepted bills of exchange was arrested after verdict "entire damages" were given, and the count, upon one of the bills, failed to aver that by the custom of merchants and others trading in England, the acceptor was obliged to pay. This was in 1671. Other decisions in this class of cases, not less remarkable, are familiar to those versed in the learning of the elder reports. The law merchant was not made. It grew. Time and experience, if slower, are wiser law makers than legislative bodies. Customs have sprung from the necessities and the convenience of business, and prevailed in duration and extent until they ac-

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quired the force of law. This mass of our jurisprudence has thus grown, and will continue to grow, by successive accretions.

We have disposed of this case as it is before us.

How far it may be changed in its essential character, if at all, by a full development of the evidence on both sides in the further trial, which will doubtless take place, it is not for us to anticipate.

The judgment below is reversed, and a *venire de novo* awarded.

Mr. Justice MILLER was not present at the arguments of this case, and did not participate in its decision.

Mr. Justice CLIFFORD (with whom concurred Mr. Justice DAVIS) delivered a dissenting opinion.

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NOTE.—THE EFFECT OF A CERTIFICATION. — A bank by certifying a check drawn on it warrants only the genuineness of the drawer's signature and that he has the amount of the check to his credit. *Nat. Bank of Commerce v. Nat. Mechanics' Bank*, 55 N. Y. 211; S. C., 14 Am. Rep. 232. In that case a check was "raised" after it had been certified, and was paid as "raised." It was held that the bank could recover back the sum so paid less the original amount of the check. And in *Marine Nat. Bank v. Nat. City Bank*, 59 N. Y. 67; S. C., 17 Am. Rep. 305, the doctrine was applied to a case where a check had been certified after it had been "raised." There the check was fraudulently altered as to date, name of payee, and amount, and, so altered, was certified and afterward paid by the bank. It was held that the bank could recover the money paid beyond the original amount.

The court said: "When a check is presented to a bank on which it is drawn for certification, the purpose is to ascertain, with certainty, what the bank alone can know, and this is, whether the drawers of the check have funds sufficient to meet it; and further, to obtain the engagement of the bank that these funds shall not be withdrawn from the bank by the drawers of the check. To this extent the knowledge of the bank must of necessity enable it safely to go in the way of assertion; and its own power over its own funds will suffice to protect it as to its obligation. But if the doctrine contended for in opposition to this view is correct, and the certifying bank is bound to warrant, not only the genuineness of the drawer's signature and the sufficiency of their credit, but also the genuineness of the check in all its parts, includ-

ing the specification of the amount to be paid and the name and identity of the payees, then obviously there must occur an immediate and complete change in the modes of doing business, which would defeat and practically put an end to the use of certified checks. For no bank under such a rule could safely certify a check without, in the first instance, investigating its origin and history by inquiring of the makers and payers. The burden of such inquiries could not be borne without interfering with or interrupting the other necessary business of the banks, and the practice of certifying checks would have to be abandoned, or a staff of inquiries instituted in every bank specially charged with these duties. It is plain that banks, in self protection, would be compelled to refuse altogether to certify checks, and that this convenient and useful invention of modern business would come to an end. The mischief would arise from charging the banks with a knowledge that in the nature of things they cannot possess. With their responsibility limited to the facts within their knowledge, the practice imposes no burden upon banks and subserves the convenience of commerce. No construction ought to be put on facts, in the usual course of business, which will impose upon the parties interested the necessity of immediately altering it. For, as the question is necessarily, what did the parties mean, we cannot without violent construction attribute to them a meaning so burdensome that it will necessitate a change of the usual way of doing business. Such a meaning we know they cannot have entertained. We have been referred to various expressions in different cases

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stating in quite positive and general terms the obligation of banks upon certified checks: *Farmers' Bank v. Butchers' Bank*, 16 N. Y. 125; *First Nat. Bank v. Leach*, 52 id. 350; *Cooke v. State Nat. Bank*, id. 115. (See last two cases cited hereafter in this volume.) These are to be construed with reference to the facts disclosed in the cases. In such cases the question has been, in various forms, whether the bank certifying a check could defend itself upon the ground of want of authority in the certifying officer, or that the drawer had no funds. These being facts within the knowledge of the certifying bank, it was necessarily precluded from disputing its certificate. But there is no ground of reason or authority for extending the rule to matters not being especially within the knowledge of the certifying bank, such as to those which form the ground in this case on which the bank's claim of immunity rests."

See, also, *City Bank of Houston v. First Nat. Bank*, 45 Texas, 203.

The Supreme Court of Louisiana, however, in *Louisiana National Bank v. Citizens' Bank*, 1 La. Law Jour. 80, disapproved of the foregoing decision and held that "By certifying a check the bank bound itself to pay the amount which it said was good."

**THE POWERS OF CASHIERS.**—SEC. 5136 of the Revised Statutes of the United States provides that National banking associations shall have power among other things:

"Fifth, To elect or appoint directors, and by its board of directors to appoint a president, vice-president, cashier and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers or any of them at pleasure, and appoint officers to fill their places."

A bank will be bound by the acts of a cashier *de facto*—that is, one who has not been appointed, or lawfully appointed to the office, but who is permitted by the bank to act in that capacity. *Bank of the U. S. v. Dandridge*, 12 Wheat. 64; *Minor v. Mechanics' Bank*, 1 Pet. 46.

While directors may define the duties of a cashier they cannot, so far as affects third persons, deprive him of the powers usually appertaining to the office. One dealing with a cashier of a bank within the ordinary scope of such an officer's authority, has a right to assume, as against the bank, that the officer is invested with his customary powers. In the language of the opinion in the foregoing case, "the directors may limit his authority as they deem proper, but this would not affect

those to whom the limitation was unknown." *Commercial Bank v. Norton*, 1 Hill, 501; *Bank of Vergennes v. Warren*, 7 id. 91; *Beers v. Phoenix Glass Co.*, 14 Barb. 358; *Farmers and Mechanics' Bank v. Butchers & Drivers' Bank*, 14 N. Y. 624; *Barnes v. Ontario Bank*, 19 id. 156; *Wild v. Bank of Passamaquoddy*, 3 Mason, 505; *Franklin Bank v. Steward*, 37 Me. 519; *Meads v. Merchants' Bank*, 25 N. Y. 146.

In *Bank of Vergennes v. Warren*, *supra*, a creditor, in order to redeem of a bank lands sold under judgment, went to the banking-house during business hours and paid the money to the cashier, who accepted it and gave a receipt. On the question of the cashier's authority the opinion was as follows: "It is said that the cashier of the Farmers' Bank had no authority to transact such business; that the plaintiff should have gone to the board of directors. But it is enough that the plaintiff went to the banking-house in business hours and there made the payment to one of the principal agents of the corporation, who, by accepting the money, professed to have authority to receive it. His authority will be presumed until the contrary expressly appears. Indeed, I think it would not defeat the purchase if it could be shown that the cashier had been forbidden by his principals to transact such business. A creditor having the right to purchase from a corporation must of necessity have the right to deal with the principal officer or agent of the company, who may be found at his place of business. To hold that the creditor must go to the board of directors would be to put it in their power by refusing or neglecting to meet, to deprive him of a right secured to him by law."

In *Wild v. Bank of Passamaquoddy*, *supra*, it was said that any bank choosing to restrict the ordinary scope of its cashier's authority is at perfect liberty to do so; but that in such case it is incumbent on the bank to show, not only that it has imposed a certain restriction, but further, that the imposition of such restriction is known to those with whom it is in the habit of doing business. In *Franklin Bank v. Steward*, *supra*, it is said: "His (the cashier's) true position appears to be that of a general agent for the performance of his official and accustomed duties. While acting within the scope of his authority he would bind the bank, although he might violate his private instructions."

In *Cook v. The State National Bank*, 52 N. Y. 96; 11 Am. Rep. 667, report-

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ed hereafter in this volume, which was an action growing out of transactions between some of the parties in the above principal case, the Court of Appeals of New York said: "The bank having placed the cashier in the position which implies this inherent authority (to certify checks), those who deal with the bank have a right to infer that he possesses it, and although the exercise of it in a given case may not be warranted on account of the existence or non-existence of some extrinsic fact peculiarly within his official knowledge, yet the bank is responsible instead of an innocent party, upon every principle of reason and morality." To the same effect also are *Caldwell v. National Mohawk Valley Bank*, 64 Barb. 333.

But it is to be observed that to bind the bank the act of the cashier must be one within the corporate powers of the bank, for if the directors could not lawfully do the act the cashier cannot bind them or the bank by doing it. *Weckler v. The First National Bank*, 42 Md. 581, *post*; *Wiley v. First National Bank*, 47 Vt. 546, *post*.

So to bind a bank, the act of the cashier must be within the scope of his inherent authority, or within the established custom or usage of the particular bank, or the banks in that locality. The officers of the banks are held out to the public as having authority to act according to the general usage, practice and course of business of such institutions, and their acts, within the scope of such usage, practice and course of business, bind the bank in favor of third persons having no knowledge to the contrary. *Story on Agency*, § 114; *Minor v. Mechanics' Bank*, 1 Pet. 46; *Fleckner v. Bank*, 8 Wheat. 339; *Frankford Bank v. Johnson*, 24 Me. 490; *Cook v. State Nat. Bank*, 52 N. Y. 96, *post*; *Ryan v. Dunlop*, 17 Ill. 40. In *United States v. City Bank of Columbus*, 21 How. 356, Mr. Justice WAYNE said: "That, though the directors had power, under the act of incorporation, to fix the duties of the cashier, and though whether they had done so or not did not appear, yet the acts of the cashier done in the ordinary course of the business actually confided to such an officer may well be deemed *prima facie* evidence that they fell within the scope of his duty." And in *Fleckner v. Bank*, 8 Wheat. 339, it was held that the acts of a cashier done in the ordinary course of business of the bank are *prima facie* evidence that they fell within the scope of his duties. See also *State v. Commercial Bank*, 14 Miss. 218.

Among the ordinary and inherent duties of a cashier are the following. The

superintendence of the banks and of the payments and receipts of the bank. *Sturges v. Bank of Circleville*, 11 Ohio St. 153. The charge of the notes, securities and other funds of the bank, and of the business of negotiating, managing and disposing of them. *Wild v. Bank of Passamaquoddy*, 3 Mason, 505. The superintendence of the collection of protested notes, *Bank of Pennsylvania v. Reed*, 1 W. & S. 101; the receipt of all moneys and notes of the bank, the giving up of discounted notes and securities when paid, the drawing of checks to withdraw funds of the bank on deposit elsewhere, and as executive officer the transaction of most of the business of the bank, *United States v. City Bank of Columbus*, 21 How. 356; the charge of moveable property of the bank, *Franklin Bank v. Steward*, 37 Me. 519; the transfer of the negotiable paper belonging to the bank, *City Bank of New Haven v. Perkins*, 29 N. Y. 554; *Bank of New York v. Bank of Ohio*, *id.* 618; to borrow money on behalf of the bank, *Barnes v. Ontario Bank*, 19 N. Y. 152; *Ballston Spa Bank v. Marine Bank*, 16 Wis. 120; to discharge a mortgage securing a note due to the bank, *Ryan v. Dunlop*, 17 Ill. 40.

But a cashier cannot, without express authority from the directors, or in pursuance of the usage or custom, transfer non-negotiable paper belonging to the bank; *State v. Davis*, 50 How. Pr. (N. Y.) 447; *Barrick v. Austin*, 21 Barb. 241; nor bind the bank to indemnify an officer for levying on property under an execution in favor of the bank; *Watson v. Bennett*, 12 Barb. 196; nor bind the bank by a discharge of its debtors without judgment; *Hodge v. Nat. Bank*, 22 Gratt. (Va.) 51; nor release a surety by an agreement that he should not be called upon to pay a note that he was liable on in ordinary cases. *Cochecho Nat. Bank v. Haskell*, 51 N. H. 116; S. C., 12 Am. Rep. 67; *Olney v. Chadsey*, 7 R. I. 224; but it was further held in the same case that if a cashier deceives a surety into the belief that the note is paid, and thereby leads the surety to change his position as to the principal to the surety's injury, the bank will be estopped—so far as the surety is concerned—from denying that the note was paid. So a cashier cannot bind the bank by representing to one about to indorse a note that sufficient bank stock to secure payment of the note has been pledged by the maker, and that the indorser's liability will be merely nominal; *Bank of the United States v. Dunn*, 6 Pet. 11; *Bank of the Metropolis v. Jones*, 8 id. 12; nor by a promise to pay a forged note purporting to be issued by the

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bank; *Salem Bank v. Gloucester Bank*, 17 Mass. 29; nor by an agreement to give notice to a surety in case of the default of a maker to a note pledged as collateral; *New Hampshire Savings Bank v. Downing*, 16 N.H. 187; nor has he power to create any agency for the bank; *United States v. City Bank*, 21 How. 356; nor transfer a judgment of the bank; *Holt v. Bacon*, 25 Miss. 567; nor assign the choses in action or corporate property of the bank for the payment of its precedent debts; *Hoyt v. Thompson*, 5 N. Y. 320; although the contrary was held in *Kimball v. Cleveland*, 4 Mich. 606; *Crockett v. Young*, 9 Miss. 240; nor to sell or mortgage property of the bank; *United States v. City Bank*, 21 How. 356; *Holt v. Bacon*, 25 Miss. 567; *Leggett v. Banking Co.*, 1 N. J. Eq. 541; but in *Bank of Vergennes v. Warren*, 7 Hill, 91, the cashier was held to have authority to accept and receipt for money paid to redeem property sold under an execution in favor of the bank.

From the cases last cited it appears that the cashier cannot sell the property of the bank, other than its usual negotiable securities in the usual course of business; but after the directors have determined to sell such property, the cashier is the proper person to carry out that determination.

In some of the States it is held that a cashier may, in the ordinary course of business, transfer or assign the securities of the bank for the purpose of paying its debts; *Everett v. United States*, 6 Port. (Ala.) 166; *Carey v. Giles*, 10 Ga. 9; *Lafayette Bank v. State Bank*, 4 McLean, 208; *Kimball v. Cleveland*, 4 Mich. 606; *Crockett v. Young*, 9 Miss. 241; *Cooper v. Curtis*, 30 Me. 488.

It is within the general authority of the cashier of a bank to sign in its behalf, a blank transfer upon a certificate of stock in the name of the bank held by it as collateral security for a loan, and to deliver the certificate to the pledgor on payment of the loan. This was expressly held in *Matthews v. Massachusetts National Bank*, 1 Holmes, 396; S. C., 10 Albany Law Journal, 199, which was a decision by SHEPLEY, J., in the Circuit Court of the United States for the district of Massachusetts. In that case the defendant, a National bank, loaned money to C., taking in good faith, as security therefor, what purported to be a certificate of two hundred shares of the stock of a railroad company issued by the company to the bank, but which was a forgery by C. C. paying the loan, the cashier of defendant, for the purpose and with the intent of restoring the certificate to C., returned it to him with his sig-

nature in blank as cashier to the printed form of transfer on the back. Subsequently C. obtained a loan from plaintiff, giving the said certificate as collateral. The forgery having been discovered, plaintiff brought action against defendant for the damages sustained by him. Held, that the signature of the cashier bound the bank, and that the bank by that signature so far warranted the genuineness of the certificate as to be estopped from setting up the forgery as a defense.

SHEPLEY, J., said: "The real question presented in the case is whether the bank by signing the blank transfer has so far warranted the genuineness of the certificate, that it is estopped from setting up the forgery as a defense to this action. Defendant denies that the cashier had authority or right to bind the bank by the contract declared on. Cashiers of a bank are held out to the public as having authority to act according to the general usage, practice and course of business conducted by the bank. Their acts, within the scope of such usage, practice and course of business, will in general bind the bank in favor of third persons possessing no other knowledge. *Morse v. Massachusetts Nat. Bank*, 1 Holmes, 209; *Minor v. The Mechanics' Bank*, 1 Pet. 70; *Merchants' Bank v. State Bank*, 10 Wall. 604. One of the ordinary and well-known duties of the cashier of a bank is the surrender of notes and securities upon payment, and his signature to the necessary transfers of securities or collaterals when in the form of bills of exchange, choses in action, stock certificates, or similar securities for loans, which are personal property, is an act within the scope of the general usage, practice and course of business in which cashiers of a bank are held out to the public as having authority to act. Undoubtedly the ordinary duties of a cashier do not comprehend the making of a contract which involves the payment of money, without an express authority from the directors, unless it be such as relates to the usual and customary transactions of the bank. But the transfer of certificates of stock held as collateral is certainly one of the usual and customary transactions of banks, and the public would be no more likely to require evidence of a special authority to the cashier to make such transfer than of a special authority to draw checks on other banks, or to perform any other of the daily duties of his office. The signature of the cashier must therefore be considered as the signature of the bank, and the question returns whether such blank assignment on the back of



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the certificate by the bank be so far a warranty of the genuineness of the certificate that the bank is estopped from setting up the forgery as a defense."

The cashier may take such measures for the security or collection of debts due the bank as he deems proper, and he may act in reference to the collection or compromise thereof, according to the general usage, practice and course of business; *Bridenbecker v. Lowell*, 32 Barb. 9; *Hartford Bank v. Barry*, 17 Mass. 94; *Bank of Pennsylvania v. Reed*, 1 Watts. & S. (Penn.) 101; *Payne v. Commercial Bank*, 14 Miss. 24; *Potter v. Merchants' Bank*, 28 N. Y. 641.

Where it was provided in a bank charter, that the funds of the bank should in no case be liable for any contract or engagement, unless the same should be signed by the president, and countersigned by the cashier, it was held that this did not apply to the ordinary business and duties of a cashier, such as indorsing bills, etc. *Merchants' Bank v. Central Bank*, 1 Ga. 418; *Cary v. McDougall*, 7 Ga. 84; *Northern Bank of Kentucky v. Johnson*, 5 Cold. (Tenn.) 88.

If the cashier of a bank enters into a contract in behalf of the corporation, without authority for the purpose, and the bank claims the benefit of the contract, it is thereby ratified by the corporation. *Medomak Bank v. Curtis*, 24 Me. 36; *Farmers and Mechanics' Bank v. Troy City Bank*, 1 Dougl. (Mich.) 457.

If the cashier of a bank should pay to a bona fide holder the amount of a forged check drawn on the bank, or of forged notes of the bank, the payment cannot be recalled; because he is intrusted by the bank with an implied authority to decide on the genuineness of the handwriting of the drawer of the check, and of the paper of the bank. The act of payment is to be distinguished in this respect, from a mere admission. *Bank of United States v. Bank of Georgia*, 10 Wheat. 333, S. P.; *Salem Bank v. Gloucester Bank*, 17 Mass. 1; *Merchants' Bank v. Marin Bank*, 3 Gill. (Md.) 96.

Among the inherent powers of a cashier is that of certifying checks, and while as between himself and the bank he has no right to certify a check to be good unless there are funds in the bank at the time to meet it, yet if he does give such a certificate, the bank will be liable thereon to a holder in good faith. *Cook v. State Nat. Bank*, 52 N. Y. 96, reported hereafter in this volume.

It was long ago decided in Massachusetts (*Mussey v. Eagle Bank*) that a bank teller had no authority to certify

checks, and the decision was put upon grounds so general as to include cashiers. But such is no longer the law, at least as to cashiers.

In *Farmers', etc., Bank v. Butchers', etc., Bank*, 16 N. Y. 125, it was decided that tellers could bind the bank by certifying checks where such was their practice. But in the more recent case of *Pope v. Bank of Albion*, 57 N. Y. 126, it was held that a certificate by any one of less authority than a cashier, as an assistant cashier or teller, was not good where there were no funds, in the absence of express authority, or of a custom or usage, for assistant cashiers or tellers to certify. But as that case was properly decided on the point that the check was postdated it is doubtful if it will be followed on the point of the power of an assistant cashier or teller. Certainly prior to that case it was considered settled in this State that the certificate of a teller bound the bank. See opinion of FOLGER, J., *Continental Nat. Bank v. Nat. Bank of Commonwealth*, 50 N. Y. 581. However there can be no doubt of the power of any officer or agent of the bank to bind the bank by a certificate without funds where a usage or practice of the bank is proved for such officer or agent to certify checks where a drawer has funds.

A cashier has, however, implied power to certify checks only in the regular course of business, so that he cannot bind the bank by a certificate to a check given as collateral security and reciting its purpose upon its face. *Dorsey v. Abrahams* (Sup. Ct. Penn.), 5 Rep. 53.

It is to be observed that the bank is only bound by the wrongful act of its cashier or other officer in favor of an innocent person, that is, one who has no knowledge of the wrong. So that if a cashier or teller certify a check to be good when there are no funds, the bank is not liable thereon to one who knew that there were no funds. *Farmers' Bank v. Butchers', etc., Bank*, 16 N. Y. 125; *Salem Bank v. Gloucester Bank*, 17 Mass. 1.

In the case last cited a forged certification of a check was presented at the bank upon which the check was drawn to the teller whose certificate it purported to be, and he pronounced it genuine. Held, that he thereby adopted the certification, and that the bank was bound by it the same as if it was genuine.

So a cashier may bind his bank, to an innocent party, by a certificate of deposit when there is no deposit. *Barnes v. Ontario Bank*, 19 N. Y. 152; *State Bank v. Kain*, 1 Ill. 75.

But in the absence of express au-

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thority from the directors or of knowledge and assent or implied assent on their part, a cashier cannot, by gratuitously receiving securities for safe-keeping, render the bank liable for them in case of loss. *First National Bank v. Graham*, 79 Penn. St. 106; S. C., 21 Am. Rep. 49; *First National Bank v. Ocean National Bank*, 60 N. Y. 278; S. C., 19 Am. Rep. 181; *Wiley v. First National Bank*, 47 Vt. 546; S. C., 19 Am. Rep. 122; all of which cases are reported in this volume. And in the case last cited it was held that national banks were not authorized to take special deposits for safe-keeping, and that a cashier could not render the bank liable thereon by an express agreement. And this view was approved by the Court of Appeals of New York in *First National Bank v. Ocean National Bank*, *supra*.

The indorsement of negotiable paper by the cashier of a bank, by writing his name on the back of it with the addition of the name or designation of his office merely, is a sufficient indorsement to bind the bank. *Robb v. Ross County Bank*, 41 Barb. 586; *Bank of Genesee v. Patchin*, 13 N. Y. 309.

Thus where the cashier, for the accommodation of the payee or prior indorser, indorsed his name upon a note, not belonging to the bank, thus *A. B. Cas., held*, that the indorsement was official and binding on the bank. *Houghton v. The First National Bank*, 26 Wis. 663; S. C., 7 Am. Rep. 107.

A cashier cannot bind the bank by an accommodation indorsement except in favor of an innocent person who has been prejudiced by the indorsement. *Bank v. Patchin*, *supra*; *Farmers, etc., Bank v. Troy City Bank*, 1 Dougl. (Mich.) 457. Nor can he bind the bank as an accommodation indorser of his own promissory note. Such a note so indorsed would carry notice to a purchaser of its character and in an action to charge the bank the holder would be required to show actual authority in the cashier before he could recover. *West St. Louis Savings Bank v. Parmelee, etc., Bank* (U. S. Supreme Ct., 1878), 16 Alb. Law Jour. 473.

A bill drawn payable to the order of the "cashier" of a bank is payable to the bank, and no indorsement is necessary to give title to the bank. *First National Bank v. Hall*, 44 N. Y. 395; S. C., 4 Am. Rep. 698; *Bank of New York v. Bank*, 29 N. Y. 619; *Wright v. Boyd*, 3 Barb. 523; *Lacey v. Central Nat'l Bank*, 4 Neb. 179; *Fratt v. Topeka Bank*, 12 Kan. 570.

Notice to a cashier in the course of the duties of his office is notice to the bank. *Trenton Banking Co. v. Woodruff*, 2 N. J. Eq. 117; *Branch Bank v. Steele*, 10 Ala. 915; *New Hope Bridge Co. v. Phoenix Bank*, 3 N. Y. 156.

A cashier is bound to exercise reasonable skill and ordinary care and diligence in the discharge of his duties, and if he fails in either regard and in consequence thereof the bank suffers, he is liable to make good the injury. And much more is he liable to respond if he cause any damage to the bank by any illegal, fraudulent or tortious act. *Commercial Bank v. Ten Eyck*, 48 N. Y. 305; *Minor v. Bank of Alexandria*, 1 Peters, 70; *Austin v. Daniels*, 4 Denio, 299.

It is a violation of duty for a cashier to allow an overdraft. *Bank of St. Mary v. Calder*, 3 Strobb. (S. C.) 403; or to certify a check without funds; or that a deposit has been made when in fact none has been made, or to change without authority the securities of the bank. *Barrington v. Bank of Washington*, 14 Serg. & R. (Penn.) 405; to omit some duty required of him by law, as to make a report to the Comptroller of the Currency, whereby the bank has been subjected to a fine or otherwise injured. *Bank of Washington v. Barrington*, 2 Penn. 27. And in each case the sureties to the cashier's bond are liable. A cashier's bond conditioned "well and truly to execute the duties of cashier," includes not only honesty but reasonable skill and diligence. *Minor v. Mechanics' Bank of Alexandria*, 1 Peters, 46.

As to the liability of the sureties on a cashier's bond, see *Tapley v. Martin*, *post*, and note; *Graves v. Lebanon National Bank*, *post*.

—REPORTER.

## CASE V. TERRELL.

(11 Wallace, 199.)

*Receiver — whom he represents.*

The receiver of a National bank represents the bank, its stockholders and its creditors, but not in any sense the National government ; nor can the government be subjected to litigation, growing out of its relations to these banks, in all the various courts in which their affairs may be the subject of judicial controversy.

**A** PPEAL from the Circuit Court for the District of Louisiana. Terrell and others, creditors of the First National Bank of New Orleans, which had failed and been put into liquidation, brought this bill in chancery in the court below against one Case, who on the failure of the bank had been appointed receiver of it, Hurlburt, Comptroller of the Currency of the United States, and one May and Beauregard, citizens of Louisiana.

The prayer for relief was that a certain admitted debt due to the United States from the bank be ascertained ; that they (the United States) be charged with certain sums, and required to account for them, and that a writ of injunction issue restraining the Comptroller from making a dividend of the funds of the bank until the account be adjusted. Case and Hurlburt, the receiver and Comptroller as aforesaid, appeared and answered ; the answer of the latter being put in for him by the district attorney, and neither signed by Hurlburt nor sworn to by him. In it, "he submits, on behalf of the United States, to the decisions of the court the claims of the United States to priority of payment over the allowed claims of the creditors of said bank that are not disputed."

The final decree, besides making a general order on the Comptroller to distribute the funds of the bank in his hands ratably among its creditors as the law directs, decreed against the United States in favor of the creditors of the bank for the sum of \$206,039.91, and that no claim of the United States shall have any priority in the distribution of the funds of the bank except as to the bonds pledged to secure its circulation. From this decree Case, the receiver, and Hurlburt, the Comptroller, appealed.

*B. H. Bristow*, Solicitor-General, and *C. H. Hill*, Assistant Attorney-General, for Hurlburt, Comptroller ; *Mr. Case*, for himself.

*J. A. Campbell* and *H. B. Kelly*, *contra*.

Mr. Justice MILLER delivered the opinion of the court.

It is seen, from the bill and decree, that while the United States was not made a defendant, and while it is well settled that it could not be sued in the court below, the only relief prayed by the bill was relief against the United States, and the only decree rendered which was not merely formal was a decree against the United States for \$200,000, and a further decree barring the right to assert her priority as a creditor of the bank in the distribution of its funds. It is strange that in any court professing to administer the English system of equitable jurisprudence such a decree could be rendered against any one not made a party to the suit, and who had in no manner appeared in the case ; and it is almost incredible that in any Federal court of this Union, except the Court of Claims, a moneyed judgment could be rendered against the United States.

The contrary has been so repeatedly decided that it is a waste of time to re-argue the proposition, which will be found fully asserted in the recent cases of *DeGroot v. United States*, 5 Wallace, 419 ; *United States v. Eckford*, 6 id. 484 ; *The Siren*, 7 id. 152 ; and *The Davis*, 10 id. 15. In the case of the *United States v. Eckford* it was held that, although in a suit in which the United States was plaintiff, a set-off could be pleaded and allowed, yet no judgment could be rendered for a balance found to be due to the defendant by the verdict of the jury, either in the Circuit Court, where the case was tried, or in the Court of Claims, where suit had been brought on the verdict. It is true, that in the two last cases cited above it was held that in a case of admiralty, where the *res* was rightfully before the court, and was taken into possession by its officer without the necessity of suit or process against the United States, it could be subjected to certain maritime liens, though the ownership was in government. But in these cases the government came into court of its own volition to assert its claim to the property, and could only do so on condition of recognizing the superior rights of others.

We are quite at a loss to know on what principle the jurisdiction in the present case is asserted, for the briefs for the appellees are devoted wholly to the merits of the controversy. But we must

suppose that it is claimed on the ground that the receiver and Comptroller, both of whom appeared and answered the bill, represent the United States, and can subject the government to the jurisdiction of the court.

As to the receiver, the claim, if any such be made, is not worth serious consideration. He represents the bank, its stockholders, its creditors, and does not in any sense represent the government.

Nor can such authority be conceded to the Comptroller of the Currency. It may very well admit of doubt whether it is within his competency to submit himself, in the exercise of duties specially confided to him by acts of Congress, to the control of the courts, and especially of those which can assert no such jurisdiction by reason of their territorial limits. We are not called upon here to decide this question, but we have no hesitation in holding that, however he may submit himself to the jurisdiction of those courts, and consent to be governed in his official action by their decrees, so far as they affect rights of parties who may come into court and be impleaded in the same suit, he has no authority to subject the United States to such jurisdiction, and to submit the rights of the government to litigation in any court, without some provision of law authorizing him to do so.

There is no analogy in the case before us to suits against officers of the customs or of the internal revenue, to recover for illegal assessments or collections of taxes or duties, for they are suits against the officer for a tort, or for money had and received, and when a judgment is rendered against him, the government protects him by paying it, because the money was received for its use. But this, by virtue of statute, and the mode of proceedings is pointed out and well defined, and the remedy is limited to cases where the mode is strictly pursued.

In the answer filed for the Comptroller in this case, he says, or is made to say (for it is neither signed nor sworn to by him), that he "submits, on behalf of the United States, to the decision of the court the claims of the United States to priority of payment over the alleged claims of the creditors of said bank that are not disputed." We have already said that the Comptroller has no power to subject the United States to such jurisdiction.

But he here seems only to submit the question of the government's claim to priority of payment, while the court not only decides against this priority of payment, but renders a further decree

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requiring repayment of money had and received from the bank, and the payment of money which the United States is supposed to have assumed to pay in a contract with private parties not before the court. If the government is liable to the bank or its receiver, or its creditors, for either of these claims, it would seem that it would be, in the first case, on an implied contract for money had and received, and in the second, on the express contract to pay as alleged. When such liability is denied, or payment is refused, the Court of Claims has jurisdiction, and no other court has.

The United States cannot be subjected to litigation growing out of its relations to these banks in all the various courts in which their affairs may be the subject of judicial controversy.

But it is useless to pursue the matter further. The only substantial relief asked by the bill, or granted by the decree, is against the United States. The manifest purpose of the proceeding was to subject the government to a tribunal which could rightfully exercise no jurisdiction in the premises. It was no party to the suit, nor did any party represent its interests who had authority to bind it.

Decree reversed, with directions to the court below to

*Dismiss the bill.*

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BANK V. LANIER.

(11 Wallace, 369.)

*Loans and discounts on security of bank's own stock — Lien on stock.*

National banks can make valid loans or discounts on the security of their own stock only when necessary to prevent loss on debts previously contracted in good faith.

The placing by one bank of its funds on permanent deposit with another bank is a loan within the prohibition.

Loans by National banks to their stockholders do not give them a lien on the stock of such stockholders.

A bank issued two certificates of stock to C, declaring him the owner of one hundred and fifty shares, and that they were transferable on the books of the bank "only on the surrender of the certificate." A purchased some of these shares of C, and received the certificate regularly assigned. The bank refused to transfer the stock on the books, on the ground that the shares had been pledged to it by C, as security for deposits made by it with him,

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and had already been sold and transferred to other parties under a power of attorney from C before the bank had notice of A's purchase. A sued to obtain damages. *Held*, that the action would lie, and that the pledge of the stock by C to the bank being illegal, the previous transfer was no defense.

**I**N error to the Circuit Court for the District of Indiana.

The plaintiffs, Lanier and Handy, brought an action in the court below against the First National Bank of South Bend, to recover damages for the refusal of that bank to permit the transfer to them on its books of certain shares of stock. The following facts were alleged in the declaration:

In July, 1865, the defendant bank issued two certificates of stock to one Culver, wherein it was declared that said Culver was entitled to 150 shares in the capital stock of the institution, and that these shares were transferable on the books of the bank, in person or by attorney, only on the surrender of the certificates. This limitation on the power of transfer was in conformity with the terms of a by-law on the subject. On the 29th of January, 1866, Lanier and Handy purchased 138 shares of this stock from Culver, for value, and obtained from him the stock certificates regularly assigned, with the usual powers of attorney to transfer the stock, of which transaction the bank was notified on the 31st day of the same month of January. This purchase was not followed by any immediate request for the transfer of the stock, but in the month of January, 1868, this request was regularly made and refused.

The bank, in justification of this conduct, interposed three pleas in bar, which set up two distinct defenses.

The first and third pleas justified the refusal, on the ground that at the time the stock was taken by Culver he had pledged it as a security for such deposits as the bank might from time to time make with the house of Culver, Penn & Co., of New York, of which he was a member, and that to make the pledge more effectual, by power of attorney regularly executed, he authorized his attorney in fact to sell and transfer the stock in case the bank conceived it to be necessary, and to apply the proceeds to liquidate any balance due the bank from Culver, Penn & Co., and that 50 shares had actually been sold in pursuance of this agreement, and the proceeds applied before Culver assigned the stock certificates to the plaintiffs, and the remaining shares had been sold before the bank had notice that they were assigned.

The second plea alleged the organization of the bank under the act of 1863, and that being so organized, it established certain by-laws for conducting its business and for its protection, and to regulate the transfers of stock which were in pursuance of the authority vested in the bank by the act of Congress, aforesaid, and that the same had been from the time of their adoption, and still were in force, unrepealed and unchanged; that by virtue of the 15th section of these by-laws, it was provided that the stock of the bank should be assignable only on its books, subject to the provisions and restrictions of the act of Congress; that among the provisions and restrictions of the act was one contained in the 36th section, providing that the stock should be assignable on the books in such manner as the by-laws of the bank should prescribe; but that no shareholder should have power to sell or transfer any share so long as he should be liable to the bank for any debt. And the plea averred that the provisions of the said section 36, by the force of the by-laws of the said bank, and by virtue of said 15th section of them, became, and was a part of the by-laws of the bank, and regulated the transfers of the shares of stock held and owned in the same, and was still a part thereof, in full force and unrepealed by any act of the bank. And it averred further that Culver was indebted, etc.

To each of these pleas the plaintiffs filed general demurrers, which, on joinder, were sustained by the court, and the bank declining to answer further, judgment was rendered against it. It now brought the case here on error. The error complained of being upon the rulings of the court in sustaining the demurrer to the pleas.

*McDonald and Roache*, for the plaintiff in error.

*T. A. Hendricks, contra.*

Mr. Justice DAVIS delivered the opinion of the court.

It is unnecessary to decide whether the first and third pleas would answer the declaration, if the transaction pleaded were lawful, because the directors of the bank were forbidden by law from dealing with Culver in the manner they did. At the time this proceeding took place, the Currency Act of 1863 had been superseded by the act of June 3, 1864, which expressly repealed the former act. It is, therefore, by the provisions of the latter act, that the



conduct of banking associations must be governed, whether they were organized before or after it became a law. And in looking into this act, we find these associations expressly prohibited from making any loan or discount on the security of the shares of their own capital stock. And so marked is the policy of Congress on this subject, that it does not allow a bank to become the purchaser or holder of its shares at all, unless absolutely necessary to prevent loss on a debt previously contracted in good faith, and not then for a longer period than six months. It is easy to see, that if the power were given to a bank to loan money on the security of its shares, it would imply also a power to become the owner of those shares, and this Congress intended to guard against.

These institutions were created to subserve public purposes, and not the mere private interests of their stockholders. And in no better way could this object be attained than by placing shareholders, in their pecuniary dealings with the bank, on the same footing with other customers. Besides, how could the capital of the bank be kept available for active use, if the shareholder, who had pledged his stock for borrowed money, should be unable to meet his obligations? To the extent of the debt the capital would be withdrawn, and it is hardly possible that this could be the case for any length of time, were the debt secured outside of the shares of the bank. But it is unnecessary to seek for the reason of this prohibition, as the provision concerning it is explicit, and free from ambiguity.

Although the section in question forbids loan on discounts by a bank on the security of its own shares of stock, it is argued that this inhibition does not extend to the case of deposits made by one bank with another. But a deposit is nothing but a loan of money, and is within both the letter and spirit of the provision. It is well known that country banks keep on deposit in New York, with bankers and merchants, a considerable amount of money for their own convenience, for which they receive more or less of interest. But whether interest be obtained or not, these deposits are, equally with paper discounted over the counter of the bank, loans of money, and the reason of the rule is equally applicable to them.

The banker is accountable for the deposits he receives as a debtor, and the individual borrower of money from the bank sustains no other relation to it. In both cases money is borrowed, to

be returned in a greater or less period of time, according to the contract of the parties. Without pursuing the subject further, it is clear that the contract between the South Bend Bank and Culver was illegal, and cannot, therefore, be pleaded in avoidance of any duty imposed on the bank. It would seem, from the date of the certificates issued to Culver, that as soon as he took the stock he pledged it, and the bank is, therefore, without the excuse of endeavoring to secure a pre-existing debt contracted in good faith. The contract in its inception was in violation of law, and the bank cannot complain if it is made to suffer in consequence of it.

The defense interposed by the second plea is equally unavailing to the plaintiffs in error. This plea assumes that the bank had a lien upon the stock of Culver for his indebtedness to it, without any special agreement on the subject, by virtue of the provisions of the 36th section of the Currency Act of 1863, restricting a shareholder from transferring his stock as long as he owes the bank, which remained in operation, although the section was repealed by the act of 1864, by means of a by-law adopted when the section was in force, declaring that the stock of the bank shall be transferable only on the books of the bank, subject to the provisions and restrictions of the act of Congress aforesaid.

If it be conceded by the by-law intended to embrace the restrictions contained in the 36th section, it is hard to see what good it accomplished, because, as long as this section was in force, it was the law of the corporation, known to all men, and did not need the aid of a by-law to render it operative, and if it be contended that a bank may, through the agency of a by-law, retain a particular section that has been repealed, it is difficult to see why it may not by the same means retain all the remaining sections of the repealed statute that are applicable to its business, and thus antagonize itself to the whole policy of Congress on the subject. But of necessity a by-law cannot operate in this way, nor is there any reason to suppose it was intended that this one should have such an effect. In the absence of any action taken by the bank on the subject since the new law went into operation, the fair inference is that this by-law is used as an afterthought to serve the purpose of this suit. Congress evidently intended, by leaving out of the law of 1864 the 36th section of the act of 1863, to relieve the holders of bank shares from the restrictions imposed by that section. The policy on the subject was changed, and the directors of banking

associations were in effect notified that thereafter they must deal with their shareholders as they dealt with other people. As the restrictions fell, so did that part of the by-law relating to the subject fall with them.

It remains to be seen whether, on the case stated, Lanier and Handy can recover of the bank for a breach of corporate duty, notwithstanding the specific shares had already been transferred to other persons through the power of attorney which Culver gave when he attempted to pledge his stock as security for the deposits to be made with his New York house. And, in considering the question, we are relieved of any necessity of deciding between conflicting equities, for this suit does not seek to disturb the title of the adverse purchasers to the specific stock. It leaves them in possession of the property, and undertakes to subject the bank to damages for refusing to transfer the stock to the defendants in error. And, as we view this controversy, it makes no difference whether the transfers were actually made to other parties before or after the bank received notice of the assignment of the stock certificates by Culver to Lanier and Handy.

The power to transfer their stock is one of the most valuable franchises conferred by Congress on banking associations. Without this power, it can readily be seen the value of the stock would be greatly lessened, and, obviously, whatever contributes to make the shares of the stock a safe mode of investment, and easily convertible, tends to enhance their value. It is no less the interest of the shareholder than the public that the certificate representing his stock should be in a form to secure public confidence, for without this he could not negotiate it to any advantage.

It is in obedience to this requirement that stock certificates of all kinds have been constructed in a way to invite the confidence of business men, so that they have become the basis of commercial transactions in all the large cities of the country, and are sold in open market the same as other securities. Although neither in form or character negotiable paper, they approximate to it as nearly as practicable. If we assume that the certificates in question are not different from those in general use by corporations, and the assumption is a safe one, it is easy to see why investments of this character are sought after and relied upon. No better form could be adopted to assure the purchaser that he can buy with safety. He is told, under the seal of the corporation, that the shareholder

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is entitled to so much stock, which can be transferred on the books of the corporation, in person or by attorney, when the certificates are surrendered, but not otherwise. This is a notification to all persons interested to know that, whoever in good faith buys the stock and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred to him. And the notification goes further, for it assures the holder that the corporation will not transfer the stock to any one not in possession of the certificates.

In this state of case Lanier and Handy made their purchase of Culver. They bought for value, without knowledge of any adverse claim, in full faith that the bank would observe its engagements, and pursued in all respects the direction given in the certificates. They were not told to give notice to the bank of their purchase, nor was there any necessity for notice, because, by the rules of the bank, Culver could not transfer the stock in the absence of the certificates, and these they had in their possession. It is therefore clear, in making their purchase of Culver, that they had a right to rely on the certificates as securing to them the stock which they represented. And it is equally clear that the bank, in allowing this stock to be transferred to other parties while the certificates were outstanding in the hands of *bona fide* holders, was guilty of a breach of corporate duty, and as its conduct operated to the injury of Lanier and Handy, an action will lie in their behalf to obtain satisfaction for the injury.

These views dispose of this case, and they are sustained by recent decisions in the Court of Appeals of New York and the Supreme Court of Connecticut: *Bridgeport Bank v. New York and New Haven Railroad Company*, 30 Conn. 270; *Same v. Schuyler et al.*, 34 N. Y. 30, and, as we are advised, they also are supported by the Supreme Court of New Jersey in a case not yet reported.

*Judgment affirmed.*

## BANK OF BETHEL V. PAHQUIOQUE BANK.

(14 Wallace, 383.)

*Action against National banks — Effect of winding-up proceedings — Decision of receiver as to validity of claims not conclusive.*

An action may be brought against a National bank in any State, county, or municipal court in the county or city where such bank is located, having jurisdiction, under State laws, of similar controversies.

The receiver appointed under the National Banking Act, to wind up a bank which had suspended payment, disallowed a claim against the bank, and an action thereon was commenced in a State court. *Held*, (1) that the decision of the receiver disallowing the claim was not final, but that the creditor could have the validity of the claim adjudicated in a State court; (2) that the banking association was not so far dissolved by the winding-up proceedings as to bar the action against it.

IN error to the Supreme Court of Connecticut. The decision of the Supreme Court of Connecticut was reported in 36 Conn. 325, and in 4 Am. Rep. 80.

The action was in assumpsit for money had and received, brought in the Supreme Court of Fairfield county, Connecticut. The facts are briefly as follows: The defendant bank failed in 1868, and the U. S. Comptroller of the Currency, in pursuance of sections 46 to 50 of the Currency Act, found it to be in default, declared the bonds deposited with the government to secure the circulation forfeited, and procured the appointment of a receiver. The plaintiff bank presented its claims to the receiver, and, upon their being disallowed, brought this suit to determine their validity. The suit was defended under the direction of the Comptroller, in the name of the defendant bank for the benefit of the stockholders and creditors.

The grounds of the defense were, among other:

1. That the courts of the United States alone had jurisdiction after the appointment and acceptance of the receiver.

2. That prior to the suit brought, the Bank of Bethel had forfeited its charter by a violation of the Currency Act, in not paying its notes, and could not be sued anywhere.

3. That it could not be sued because it was, at the time, under the control and in possession of a duly appointed receiver, "inca-

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pable of self-defense, and entitled to the legal protection and guardianship thrown about it by the law."

4. That the decision of the receiver on the presentation of the claim was conclusive on the parties to the suit as an adjudication, unless set aside by the Comptroller of the Currency, or by some court of the United States having jurisdiction.

But the court gave judgment for the Pahquioque Bank for the full amount of its claim. The Bethel Bank then took the case on error before the Supreme Court of the State, where the judgment of the Supreme Court was affirmed. The Bank of Bethel thereupon brought this writ of error.

*C. B. Goodrich, Roger Averill and L. D. Brewster, for the Bank of Bethel, plaintiff in error.*

*W. F. Taylor and O. S. Seymour, contra.*

Mr. Justice CLIFFORD delivered the opinion of the court.

Associations for banking, formed pursuant to the act to provide a National currency, and duly authorized by the Comptroller of the Currency to commence the business of banking, become bodies corporate and have a succession for the period of twenty years from their organization, unless sooner dissolved according to the provisions of their articles of association, or by the act of the shareholders owning two-thirds of the stock, or unless the franchise shall be forfeited by a violation of the act under which the association was formed. Such an association is allowed to select, subject to certain conditions and the approval of the Comptroller of the Currency, another such association at which it will redeem its circulating notes at par, but the provision is that nothing in that section shall relieve any such association from its liability to redeem its notes in circulation at its own counter, at par, in lawful money, on demand; and in case of failure so to do, the holder may cause the same to be protested in one package by a notary public, unless the president or cashier of the association which issued the notes, on the president or cashier of the association designated as the place for redeeming the same, will waive demand and notice of protest and execute an admission in writing, stating the amount demanded and the fact of non-payment, and it is made the duty of the notary forthwith to forward the admission or notice of protest,

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as the case may be, to the Comptroller of the Currency for his information and action in the premises.

Notes to a large amount, issued by the corporation defendants for circulation, were held by the corporation plaintiffs, and the plaintiffs presented the same to the defendants for redemption, and the defendants failing to redeem the same, the plaintiffs offered the notes for protest, but the defendants having waived demand and notice of protest, and having tendered an admission in writing, stating the amount demanded and the fact of non-payment, the plaintiffs accepted the written admission, and the notary forwarded the same to the Comptroller of the Currency as required under such circumstances. Pursuant to the requirement of law the Comptroller of the Currency appointed a special agent to ascertain whether the facts set forth in the protest were true, and the agent so appointed having reported that the defendants had failed to redeem in lawful money their circulating notes when payment thereof was duly and lawfully demanded, he, the Comptroller of the Currency, appointed a receiver of the delinquent association, with all the powers, duties and responsibilities given to or imposed upon such an appointee in such case made and provided, and the record shows that the receiver entered upon the duties of his office and took possession of all the books, records, and assets, real and personal, of the association, and that he has ever since had the exclusive possession of the same, to be disposed of according to law. Before the commencement of the suit the Comptroller of the Currency caused notice to be published requiring all claimants to present and make proof of their claims against the delinquent association, and the record also shows that the plaintiffs presented the claim in controversy to the receiver for allowance, and that the receiver having disallowed the same, the plaintiffs instituted the present suit in the State court to recover the amount. Appropriate proceedings followed, as in an action of assumpsit, and the parties having been heard, the subordinate court where the suit was brought made a finding of facts, but reserved the question whether the case ought to be dismissed for want of jurisdiction, and if not, what judgment ought to be rendered in the case, and all questions of law arising upon the facts found, for the opinion and advice of the Supreme Court of Errors. Proper measures were adopted to obtain the opinion and advice of the appellate tribunal, and they were duly received, and thereupon the subordinate court rendered judgment in favor of the plaintiff for

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the whole amount claimed in the declaration. Proceedings in the nature of a writ of error were instituted by the defendants, by which the cause was removed into the Supreme Court of Errors, where the parties were again heard and the decision of the Court of Errors was that the judgment should be in all things affirmed. Final judgment having been rendered in the State court, the defendants sued out a writ of error under the 25th section of the Judiciary Act and removed the cause into this court.

Four only of the errors assigned will be examined, as the others, in the view of the case taken by the court, either involve substantially the same considerations or present questions not re-examinable in this court under a writ of error to a State court. Briefly stated, the errors assigned to be examined are as follows:

(1.) That the State court had no jurisdiction of the case or of the parties at the time the suit was commenced.

(2.) That the defendant association, prior to the institution of the suit, had forfeited its franchise by a violation of the act under which it was formed, and had been dissolved by the action of the Comptroller of the Currency.

(3.) That the defendant association could not be impleaded at the time the action was commenced, as prior to that time the association was prohibited by the act of Congress from paying or satisfying any of its creditors.

(4.) That the decision of the receiver disallowing the claim of the plaintiffs was final and was not subject to review in the State court.

Support to the first proposition is supposed to be derived from the conceded fact that such associations are created by an act of Congress, and that they are instruments of the National government intrusted with the power of carrying on the business of banking and of employing and circulating treasury notes as a National currency, subject to the supervision and direction of the Comptroller of the Currency and of the Secretary of the Treasury. Banking associations, it is said, were established as instruments by which the government may perform the trust of furnishing and regulating the National paper currency, and the argument is, that inasmuch as they are instruments of the government to carry into effect a National purpose they cannot be impleaded in a State court. Confirmation of that view is also attempted to be drawn from the fact that such associations are controlled by the Treasury Department,



that all the notes which they circulate as money are received from the Comptroller of the Currency, and that they cannot issue any instrument for circulation or use as money except the notes intrusted to them by the Comptroller of the Currency, as authorized by the act of Congress.

Beyond all doubt such associations are created by an act of Congress and for the purposes assumed by the defendants, but the conclusion attempted to be drawn from those facts cannot be sustained, as express provision is made by the fifty-seventh section of the act, that suits, actions, and proceedings against any such association may be had "in any State, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases." Commenced as the action was in the proper court of the State where the association is located, and in a court having jurisdiction in similar cases, which is not denied, it is quite clear that the objection to the jurisdiction of the court founded upon the character of the association as an instrument of the National government, must be overruled. Jurisdiction in such suits is unquestionably vested in any circuit, district, or territorial court of the United States held within the district in which such association may be established, but the decisive answer to the objection of the defendants is that the same section of the act of Congress gives authority to creditors to prosecute such controversies in "any State, county, or municipal court in which said association is located," in all cases where it appears that such courts have jurisdiction under the State laws in similar controversies. Proceedings to enjoin the Comptroller of the Currency under that act must, it is true, be instituted and prosecuted in a circuit, district, or territorial court of the United States, but the act allows creditors to sue in the proper State courts in all suits, actions, and proceedings against the association, as specifically provided in the fifty-seventh section of the act. Authorities to support the proposition are not necessary, as it rests upon an express provision in the act of Congress. 13 Stat. at Large, 116.

II. Associations of the kind have a succession for the period of twenty years from their organization, unless sooner dissolved in some one of the modes pointed out in the act under which such associations are formed, and throughout that period, unless sooner dissolved, they may make contracts in the name designated in their organization certificate, and may sue and be sued, or complain and

defend in any court of law or equity as fully as natural persons. Such corporate franchises cease to exist when the term for which they were granted expires, and the association may at any time go into liquidation and be closed by the vote of its shareholders owning two-thirds of the stock, but it is not necessary to remark upon those topics, as it is not pretended that the defendant association has ceased to exist or been dissolved in either of those modes. All such associations are bound to redeem their circulating notes either at their own counter or at such other similar association as they are allowed to select for that purpose, and the provision is that if any association shall fail either to make the selection or to redeem its notes as required, the Comptroller of the Currency may, upon receiving satisfactory evidence thereof, appoint a receiver, in the manner provided in the act, to wind up its affairs. Holders of the circulating notes of such an association may demand payment thereof at the office of such association, or at its place of redemption designated as aforesaid, and if the association fail to redeem the same in lawful money, they may cause the same to be protested, as before explained, and the notary, on making such protest or upon receiving such admission, shall forthwith forward the same to the Comptroller of the Currency for his information and action in the premises. Being informed of the default of the association in that mode, it is made the duty of the Comptroller to make an examination into the facts, and if satisfied that the default has been committed, to give notice to the association; and the same section provides that from that time it shall not be lawful for the association suffering the default to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to it and to deliver special deposits. On receiving such notice the Comptroller of the Currency, with the concurrence of the Secretary of the Treasury, may appoint a special agent to examine into the facts of the case, and if satisfied from the protest or the report of the special agent that the charge of default as made is true, he shall, within thirty days, declare the bonds and securities pledged by the association forfeited and give notice to the holders of the circulating notes to present the same for payment at the treasury, and the provision is that in that event he may in his discretion cause an amount of the bonds pledged, equal at current rates to the amount paid to redeem the outstanding notes of the association, or he may

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cause such an amount of the bonds pledged as may be necessary to redeem the outstanding notes, to be sold at public auction ; or, if he shall be of the opinion that the public interest will be best promoted thereby, he may sell at private sale any of the bonds so pledged and receive therefor either money or the circulating notes of such failing association. Power is also conferred upon the Comptroller of the Currency in such a case forthwith to appoint a receiver, to take possession of the books, records, and assets of every description of the association, and to collect all debts due and claims belonging to it, and upon the order of a court of record of competent jurisdiction he may sell or compound all bad or doubtful debts and may sell all the real and personal property of the association on such terms as the court shall direct, and may, if necessary to pay the debts of the association, enforce the individual liability of the stockholders, as enacted by the twelfth section of the act. All moneys so made by the receiver he is to pay over to the Treasurer of the United States, subject to the order of the Comptroller of the Currency, and he is also to make report to that officer of all his acts and proceedings. Receivers may also be appointed for other causes than those already mentioned ; as for example, in case the money reserve which the association is required to have on hand shall fall below the prescribed amount, and when notified to make it good the association shall fail for thirty days to comply with the requirement, or shall fail for thirty days to increase the capital stock of the association to the minimum amount required, where the same has been reduced below that amount by the delinquency of the shareholders and consequent sale and reduction of the stock ; or, in case any such association which is required to keep undiminished the twenty per centum surplus mentioned in the twelfth section of the act, shall fail to keep it good, in which event the provision is that the Comptroller of the Currency may compel said banking association to close its business and wind up its affairs, as provided in the act under which it was organized. Whenever a receiver is appointed, the Comptroller is required to give notice of the fact, requesting all persons having claims against the association to present the same, and to make legal proof thereof. Provision is first to be made by the Comptroller for refunding to the United States any such deficiency in redeeming the notes of the association as is mentioned in the act, and having refunded that amount the Comptroller is required in the next place to make a

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ratable dividend of the money paid over to him by the receiver on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction. Claims proved to the satisfaction of the Comptroller are to be included in the list, and he is also to include in the list all claims adjudicated in a court of competent jurisdiction, which shows conclusively that claims disallowed by the Comptroller may be prosecuted in a court having jurisdiction in such cases. *Kennedy v. Gibson*, 8 Wall. 506. Where the whole assets are not collected and distributed in the first dividend, further dividends on claims proved and adjudicated may be made as the proceeds of the assets are collected and paid to the treasurer, and the remainder, if any, shall be paid to the shareholders.

None of these proceedings, however, support the theory that the association ceased to exist when the receiver was appointed, nor at any time before the assets of the association are fully administered and the balance, if any, is paid to the owners of the stock or their legal representatives.

Delinquent associations whose notes have been protested, and whose officers have been notified by the Comptroller that proceedings for liquidation under the act have been instituted, cannot lawfully pay out any of their notes, or discount any notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to the association, and to deliver special deposits, which, of itself, refutes the theory that the association at that stage of the proceedings has ceased to exist. Evidence to refute that theory is also found in the proviso to the fiftieth section of the act, which empowers the association, if they deny having failed to redeem their circulating notes, to apply, within ten days after being so notified by the Comptroller that such proceedings have been commenced, to the nearest circuit, or district, or territorial court of the United States, to enjoin further proceedings in the premises, and those courts are invested with full jurisdiction to hear and determine the matters put in issue by such an application.

Such associations are authorized to elect or appoint directors, and the directors are empowered to exercise all such incidental powers as shall be necessary to carry on the business of banking. They may make by-laws, discount and negotiate promissory notes, drafts, bills of exchange, or other evidences of debt; receive deposits, buy and sell exchange, coin and bullion; loan money on personal

security and obtain, issue, and circulate notes according to the provisions of the act to provide a National currency. Throughout, they are enjoined to conform to the regulations of that act, and the provision is, that if they knowingly violate any of its provisions, or knowingly permit them to be violated, all the rights, privileges and franchises of the association derived from the act shall be thereby forfeited; but the further provision is, that such violation, before the association shall be declared dissolved, shall be determined and adjudged by a proper circuit, district, or territorial court of the United States, which shows conclusively that the act of the Comptroller in appointing a receiver does not work a complete dissolution of the association, as is supposed by the defendants. *Frost v. Coal Company*, 24 How. 283; Ang. & Am. on Corp. (9th ed.) 777; Abbott's Digest, title "Corporation," 338; Grant on Corporations, 295.

III. Express power to sue and be sued, complain and defend, in any court of law and equity, is conferred on such associations by the eighth section of the act providing for their organization, and it seems quite clear that the association is a proper party to be sued in all matters in which the corporation is interested, unless the association is disqualified for that purpose by virtue of the appointment of a receiver or by his subsequent action as such under his appointment. Neither power to sue nor to be sued in such cases is anywhere in terms conferred upon the receiver, nor upon the Comptroller of the Currency in any case except when he institutes a suit to forfeit the rights, privileges, and franchises of the association, and in that case the provision is express that the suit shall be in his own name. *Case v. Terrell*, 11 Wallace, 201. Beyond doubt the appointment of a receiver supersedes the power of the directors to exercise the incidental powers necessary to carry on the business of banking, as the receiver is required to take possession of the books, records and assets of every description of the association, and from that moment the association is forbidden to pay out any of its notes, discount any notes or bills, or otherwise prosecute the business of banking, but the corporate franchise of the association is not dissolved, and the association, as a legal entity, continues to exist, as is shown to a demonstration by the fact that it is required safely to keep the money on hand belonging to it, and may deliver special deposits in its keeping to the rightful owners.

Much aid cannot be derived from authorities in the examination of this proposition, as the question turns chiefly if not entirely upon the construction of the act of Congress, and suffice it to say that we are all of the opinion that the act contains nothing in its subsequent provisions inconsistent with the theory of the plaintiffs, that the association may sue and be sued, complain and defend, in all cases where it may be necessary that the corporate name of the association shall be used for that purpose in closing its business and winding up its affairs under the provisions of the act which authorized its formation.

Suits and proceedings under the act, in which the United States or their officers or agents are parties, whether commenced before or after the appointment of a receiver, are to be conducted by the district attorney under the direction of the Solicitor of the Treasury, and no doubt is entertained that the directors, from the time a receiver is appointed, cease to have any power in respect to such matters, and that the control and supervision of the same are vested in the proper officers of the United States. Claims presented by creditors may be proved before the Comptroller or may be established by a suit against the association in any court of competent jurisdiction. *Kennedy v. Wilson*, 8 Wallace, 506. Creditors, say the court in that case, must seek their remedy through the Comptroller, in the mode prescribed in the act of Congress, and cannot proceed directly in their own names against the stockholders or debtors of the corporation. Suits may be brought by the receiver, both at law or in equity, and the express decision there is that he may sue in his own name or in the name of the association for his use, and no reason is perceived to doubt the correctness of the rule adopted in that case, though the act of Congress does not in terms give him authority to sue in his own name. *Booth v. Clark*, 17 Howard, 322.

IV. Enough has already been remarked to show that the fourth proposition of the defendants cannot be sustained, as the act of Congress provides that the receiver, in making the basis for a dividend, shall include in the list, not only claims proved before him to his satisfaction, but claims also adjudicated in a court of competent jurisdiction.

Attempt is made to show that the adjudicated claims there referred to are only such as had been adjudicated before the receiver was appointed, but the court is of the opinion that such a con-

## Bank v. Kennedy.

struction is not warranted either by the language employed, or the subject-matter to which it relates, or the purpose to be accomplished, or by the analogies of the law or the usual rules of interpretation which courts apply in ascertaining the meaning of a legislative provision of a remedial character. Tested by any one or all of these criteria the court is of the opinion that the construction assumed by the defendants is quite too narrow to carry into effect the intention which the framers of the provision had in view at the time it was adopted. Claims presented by creditors may be proved before the receiver, or they may be put in suit in any court of competent jurisdiction, as a means of establishing their validity and to determine the amount owed by the association, but the judgment when recovered will not give the creditor any lien on the property of the delinquent association, nor secure to the judgment creditor any preference over other creditors whose claims are proven before the receiver. All alike must await the action of the Comptroller of the Currency, and be content with a just and legal distribution of the proceeds of the assets collected by the receiver and liquidated by the Comptroller according to the act of Congress in such case made and provided.

Nothing further need be remarked in respect to the other errors assigned, as it is clear that the conclusions announced dispose of all the questions in the case which are examinable under a writ of error to a State court.

*Judgment affirmed.*

## BANK V. KENNEDY.

(17 Wallace, 19.)

*Action by receiver to collect debts.*

The receiver appointed to wind up a National bank may bring suit to collect debts due the bank either in his own name as receiver or in the name of the bank.

Such receiver may bring an action to recover an ordinary debt due the bank without an order from the Comptroller of the Currency. *Kennedy v. Gibson*, ante, p. 17, distinguished.

**E**RROR to the Supreme Court of the District of Columbia.

The action was by Kennedy, receiver of the Merchants' National Bank, against the National Bank of the Metropolis, to recover

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a balance alleged to be due on a check of fifty thousand dollars drawn by one Robinson on the said Bank of the Metropolis, in favor of said Merchants' Bank, and duly presented for payment and admitted to be due.

The only question of interest was as to the authority of the receiver to sue—the other questions being solely questions of evidence.

Verdict and judgment in the court below were given for the plaintiff.

*Hubley Ashton and W. D. Davidge*, for plaintiffs in error.

*R. T. and W. M. Merrick*, *contra*.

Mr. Justice BRADLEY delivered the opinion of the court.

The first and second errors assigned are that the plaintiff, who is a receiver appointed by the Comptroller of the Currency under the fiftieth section of the National Banking Law, is not entitled to bring suit without the authority or direction of the said Comptroller—which is not alleged or shown in this case; and that the action cannot be maintained by the receiver in his own name as such.

These objections are based upon the language of the act referred to as well as the general nature of the receiver's office. The statute (§ 50, 13 Stat. at Large, 114) enacts:

“That on becoming satisfied, as specified in this act, that any association has refused to pay its circulating notes as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he shall deem proper, who, under the direction of the Comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to such association, and upon the order of a court of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders provided for by the twelfth section of this act; and such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller,” etc.



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We have already decided in the case of this very receiver that he may bring suit in his own name, or use the name of the association. *Kennedy v. Gibson*, 8 Wall. 498 (*ante*, p. 17).

The subject was also largely discussed in the case of *The Bank of Bethel v. The Pahquioque Bank*, 14 Wall. 383,\* and the same views were held; the action in that case being brought against the insolvent bank. This disposes of the question as to the legal right of the receiver to sue.

It remains, therefore, to determine whether it is necessary for the receiver, before bringing suit in an ordinary case of a debt or claim due the bank, to have the order of the Comptroller for that purpose. In the case already referred to, the receiver had instituted a suit in equity against some of the stockholders of the bank for the purpose of charging them with the personal liability prescribed by the twelfth section of the act; and we held that he had no right to do this without the Comptroller's direction. But it will be perceived that that was a very special case, out of the ordinary course, and one which involved an important consideration of the policy to be pursued.

Stockholders are not ordinary debtors of the bank, but are rather in the light of creditors, their stock being regarded as a liability. They are entitled to all the surplus that remains, if any should remain, after the payment of the debts. They are only conditionally liable for those debts after all the ordinary resources of the bank have been exhausted, and they ought not to be prosecuted without due regard to the circumstances of the case. The determination on the part of those charged with winding up the affairs of the bank, to resort to this ultimate remedy, requires the exercise of due consideration; and a receiver ought not to take it upon himself to decide so important a question without reference to the Comptroller under whose direction he acts. Although it is his duty to collect the assets of the institution he does not distribute them, and cannot ordinarily know, without reference to the Comptroller, whether a prosecution of the stockholders will be necessary or not. Hence our decision in the case of *Kennedy v. Gibson* cannot fairly be quoted for the government of a case like the present, which is a suit to recover an ordinary debt. The language of the statute authorizing the appointment of a receiver to act under the direction of the Comptroller, means no more than that the receiver shall be subject to the direction of the Comptroller.

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It does not mean that he shall do no act without special instructions. His very appointment makes it his duty to collect the assets and debts of the association. With regard to ordinary assets and debts no special direction is needed; no unusual exercise of judgment is required. They are to be collected of course; that is what the receiver is appointed to do. We think there was no error in the decision of the court below on these points, and that the action was properly brought by the receiver.

(The remainder of the opinion was devoted to a consideration of questions as to the admissibility of evidence.)

*Judgment affirmed.*

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TIFFANY V. NATIONAL BANK OF MISSOURI.

(18 Wallace, 409.)

*Interest — rate of, on loans.*

The 30th section of the National Banking Act (R. S., § 5197) provides that National banks "may take, receive, reserve and charge on any loan, \* \* \* interest at the rate allowed by the laws of the State or Territory where the bank is located, *and no more*; except that where, by the laws of any State, a different rate is *limited* for banks of issue, organized under State laws, the rate so limited shall be allowed for associations organized in any such State under this act." *Held*, that where the rate of interest allowed generally was higher than that allowed to State banks of issue National banks were entitled to the higher rate.

**E**RROR to the Circuit Court for the District of Missouri.

Action by Tiffany, trustee of Darby, a bankrupt, against the National Bank of Missouri, to recover, under the provisions of section 30 of the National Banking Act of 1864 (R. S., § 5197), twice the amount of interest paid by said Darby on certain loans made by the bank to him before he was adjudicated a bankrupt. The ground of the action was that the interest charged and paid was 9 per cent, whereas the lawful rate was alleged to be 8 per cent.

In Missouri the general rate of interest was 10 per cent, but State banks of issue were limited to 8 per cent.

On demurrer the court below held that the National banks of Missouri could take more than 8 per cent.

*S. Knox*, for appellant.

*J. O. Broadhead*, *contra*.

Mr. Justice STRONG delivered the opinion of the court.

In an action like the present, brought to recover that which is substantially a statutory penalty, the statute must receive a strict, that is, a literal construction. The defendant is not to be subjected to a penalty unless the words of the statute plainly impose it.

The question, therefore, is whether the thirtieth section of the act of Congress of June 3d, 1864, relative to National banking associations, clearly prohibits such associations in the State of Missouri from reserving and taking a greater rate of interest than 8 per cent. The rate limited by the laws of that State to be charged by the banks of issue organized under its laws. It is only in case a greater rate of interest has been paid than the National banking associations are allowed to receive that they are made liable to pay twice the interest. The act of Congress enacts that every such association "may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange or other evidences of debt, interest at the rate allowed by the laws of the State or Territory where the bank is located and no more; except that where, by the laws of any State, a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized in any such State under the act." What, then, were the rates of interest allowed in Missouri when the loans were made by the defendants that are alleged to have been usurious? It is admitted to have been 10 per cent, per annum, allowed to all persons, except banks of issue organized under the laws of the State, and they were allowed to charge and receive only 8 per cent.

The position of the plaintiff is, that the general provision of the act of Congress that National banking associations may charge and receive interest at the rate allowed by the laws of the State where they are located, has no application to the case of these defendants, and that they are restricted to the rate allowed to banks of issue of the State, that is, to 8 per cent. This, we think, cannot be maintained.

The act of Congress is an enabling statute, not a restraining one, except so far as it fixes a maximum rate in all cases where State banks of issue are not allowed a greater. There are three provisions in section 30, each of them enabling. If no rate of interest is defined by State laws, 7 per cent is allowed to be charged. If there is a rate of interest fixed by State laws for lenders generally, the banks are allowed to charge that rate, but no more, except that if

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State banks of issue are allowed to reserve more, the same privilege is allowed to National banking associations.

Such, we think, is the fair construction of the act of Congress, entirely consistent with its words and with its spirit. It speaks of allowance to National banks, and limitations upon State banks, but it does not declare that the rate limited to State banks shall be the maximum rate allowed to National banks.

There can be no question that if the banks of issue of Missouri were allowed to demand interest at a higher rate than 10 per cent National banks might do likewise. And this would be for the reason that they would then come within the exception made by the statute, that is, the exception from the operation of the restrictive words "no more" than the general rate of interest allowed by law. But if it was intended they should in no case charge a higher rate of interest than State banks of issue, even though the general rule was greater, if the intention was to restrict rather than to enable, the obvious mode of expressing such an intention was to add the words "and no more" as they were added to the preceding clause of the section. The absence of those words, or words equivalent, is significant. Coupled with the general spirit of the act, and of all the legislation respecting National banks, it is controlling. It cannot be doubted, in view of the purpose of Congress in providing for the organization of National banking associations, that it was intended to give them a firm footing in the different States where they might be located. It was expected they would come into competition with State banks, and it was intended to give them at least equal advantages in such competition. In order to accomplish this they were empowered to reserve interest at the same rates, whatever those rates might be, which were allowed to similar State institutions. This was considered indispensable to protect them against possible unfriendly State legislation. Obviously, if State statutes should allow to their banks of issue a rate of interest greater than the ordinary rate allowed to natural persons, National banking associations could not compete with them, unless allowed the same.

On the other hand, if such associations were restricted to the rates allowed by the statutes of the State to banks which might be authorized by the State laws, unfriendly legislation might make their existence in the State impossible. A rate of interest might be prescribed so low that banking could not be carried on,

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except at a certain loss. The only mode of guarding against such contingencies was that which, we think, Congress adopted. It was to allow to National associations the rate allowed by the State to natural persons generally, and a higher rate if State banks of issue were authorized to charge a higher rate. This construction accords with the purpose of Congress, and carries it out. It accords with the spirit of all the legislation of Congress. National banks have been National favorites. They were established for the purpose, in part, of providing a currency for the whole country, and in part to create a market for the loans of the general government. It could not have been intended, therefore, to expose them to the hazard of unfriendly legislation by the States, or to ruinous competition with State banks. On the contrary, much has been done to insure their taking the place of State banks; the latter have been substantially taxed out of existence. A duty has been imposed upon their issues so large as to manifest a purpose to compel a withdrawal of all such issues from circulation. In harmony with this policy is the construction we think should be given to the thirtieth section of the act of Congress we have been considering. It gives advantages to National banks over their State competitors. It allows such banks to charge such interest as State banks may charge, and more, if by the laws of the State more may be charged by natural persons.

The result of this is that the defendants, in receiving 9 per cent interest upon the loans made by them, have not transgressed the act of Congress, consequently they are under no liability to the plaintiff.

*Judgment affirmed.*

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BULLARD V. BANK.

(18 Wallace, 589.)

*National banks cannot acquire lien on their own stock.*

The articles of association and the by-laws of a National bank prohibited the transfer of stock owned by any stockholder indebted to the bank until such indebtedness should be satisfied. *Held*, that the prohibition was invalid, under section 35 of the National Banking Act, and that the bank could not thus acquire a lien on the shares of the stockholders.\*

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\* See *Bank v. Lanier*, ante, p. 70. This case overrules *Dunkerson's Case*, 4 Biss. 227, and *Knight v. Bank of Providence*, 4 Am. Law Times Rep. 240,

ON certificate of division in opinion between the judges of the Circuit Court for the District of Massachusetts.

Action by Bullard as trustee in bankruptcy of one Clapp, against the National Eagle Bank of Boston, to recover for a refusal by said bank to allow certain stock owned by Clapp to be transferred.

The defendant was organized under the National Banking Act of 1864, the thirty-fifth section of which provided:

"That no associations shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser nor holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith."

The act also provided that associations for carrying on banking might be formed "by any number of persons not less than five, who shall enter into articles of association which shall specify, in general terms, the object for which the association is formed, and may contain any other provisions not inconsistent with the provisions of this act which the association may see fit to adopt for the regulation of the business of the association, and the conduct of its affairs."

Section 8 provided:

"That every association formed pursuant to the provisions of this act shall from the date of the execution of its organization certificate, be a body corporate \* \* \* and its board of directors shall have power to define and regulate by by-laws not inconsistent with the provisions of this act, the manner in which its stock shall be transferred \* \* \* its general business conducted, and all the privileges granted by this act to associations organized under it shall be exercised and enjoyed."

"SEC. 12. That the capital stock of any association formed under this act shall be divided into shares of \$100 each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association."

wherein it was held that a National bank could, by a by-law, create a lien on the shares of a stockholder who was indebted to it. It also overrules *Pendergast v. Bank of Stockton*, 4 Am. Law Times Rep. 247; and *In re Bigelow*, 1 Bankruptcy Reg. 202. In *Rosenback v. Salt Springs National Bank*, 53 Barb. 495, the Supreme Court of New York held that a lien could not be created by by-law, but the court was of opinion that the articles of association could authorize such lien—an opinion directly at variance with this case of *Bullard v. Bank*. In *Conklin v. The Second National Bank*, *post*, the Court of Appeals of New York held void a clause in the certificate of stock giving the bank a lien. See, also, *Evansville National Bank v. Metropolitan Bank*, *post*; and *Johnson v. Laffin*, *post*.

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The articles of association of the National Eagle Bank contained a provision that the directors of the association shall

“Have the power to make all by-laws that it may be proper and convenient for them to make under said act, for the general regulation of the business of the association, and the entire management and administration of its affairs ; which by-laws may prohibit, if the directors so determine, the transfer of stock owned by any stockholder who may be liable to the association, either as principal debtor or otherwise, without the consent of the board.”

Subsequently, on the 22d of November, 1871, at a meeting of the directors, the following by-law was adopted :

“In pursuance of one of the articles of association, and to carry the same into effect, and in the exercise of an authority conferred by an act, under which the bank was organized, to define and regulate the manner in which its stock may be transferred, it is hereby declared, ‘All debts actually due and payable to the bank (days of grace for payment being passed) by a stockholder, as principal debtor or otherwise, requesting a transfer, shall be made, unless the board of directors shall direct to the contrary.’”

And on the 7th of December, 1871, this by-law was amended by adding the words, “And no person indebted to the bank shall be allowed to sell or transfer his or her stock without the consent of a majority of the directors, and this whether liable as principal or surety and whether the debt or liability be due or not.”

The said Clapp purchased one hundred and fifty shares of stock in said bank. He afterward borrowed money of the bank, and was subsequently decreed to be a bankrupt, and Ballard was appointed trustee. Ballard claimed the stock as part of the assets of the estate and demanded a transfer of them to him, which was refused, and this action brought. The judges in the court below differed in opinion as to what judgment should be given, and certified to this court for answer these questions:

*First.* Whether a National bank, organized under and controlled by the act of 1864, can acquire a valid lien upon the shares of its stockholders by the articles of association or by-laws, as proved in this case.

*Second.* Whether if such articles of association and by-laws, or both, created any valid lien upon the shares of the stockholders in a National bank organized under the act of 1864, such lien attached to the shares before the time when there was an existing debt, from the stockholders to the bank due and unpaid?

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*Third.* Whether the National Eagle Bank is entitled to hold the interest of Clapp, in the stock mentioned, by way of lien or security, for any of the notes mentioned?

*B. R. Curtis*, for plaintiff.

*C. B. Goodrich*, *contra*.

Mr. Justice STRONG delivered the opinion of the court.

The extent of the powers of National banking associations is to be measured by the act of Congress under which such associations are organized. The fifth section of that act enacts that the articles of association "shall specify in general terms the object for which the association is formed, and may contain any other provisions not inconsistent with the provisions of this act, which the association may see fit to adopt for the regulation of the business of the association and the conduct of its affairs." And the eighth section of the same act empowers the board of directors "to define and regulate by by-laws, not inconsistent with the provisions of this act, the manner in which its stock shall be transferred." There are other powers conferred by the act, but unless these confer authority to make and enforce a by-law giving a lien on the stock of debtors to a banking association very plainly it has not been given. What then were the intentions of Congress respecting the powers and rights of banking associations? The act of 1864 was enacted as a substitute for a prior act, enacted February 25th, 1863, and in many particulars the provisions of the two acts are the same. But the earlier statute, in its thirty-sixth section, declared that no shareholder in any association under the act should have power to transfer or sell any share held in his own right so long as he should be liable, either as principal, debtor, surety, or otherwise, to the association for any debt which had become due and remained unpaid. This section was left out of the substituted act of 1864, and it was expressly repealed. Its repeal was a manifestation of a purpose to withhold from banking associations a lien upon the stock of their debtors. Such was the opinion in this court in *Bank v. Lanier*, 11 Wall. 369. In that case it appeared that a bank had been organized under the act of 1863, and that it had adopted a by-law, which had not been repealed, that the stock of the bank should be assignable only on its books, subject to the provisions and restrictions of the act of Congress,



among which provisions and restrictions was the one contained in the thirty-sixth section, that no shareholder should have power to sell or transfer any share so long as he should be liable to the bank for any debt due and unpaid. And when the bank was sued for refusing to permit a transfer of stock, it set up, in defense, that the stockholder was indebted to it, and that under the by-law he had no right to make the transfer. But this court said: "Congress evidently intended, by leaving out of the act of 1864 the thirty-sixth section of the act of 1863, to relieve the holders of bank shares from restrictions imposed by that section. The policy on the subject was changed, and the directors of banking associations were, in effect, notified that thereafter they must deal with their shareholders as they dealt with other people. As the restrictions fell, so did that part of the by-law relating to the subject fall with them." But this could have been only because the restriction was regarded as inconsistent with the policy and spirit of the act of 1864. It cannot truly be said that the by-law was founded upon the thirty-sixth section, though it doubtless referred to that section. It was not in that the power to make by-laws was given. The eleventh section was the one which authorized associations to make by-laws, not inconsistent with the provisions of the act, for the management of their property, the regulation of their affairs, and for the transfer of their stock; and that was substantially re-enacted in the act of 1864. Moreover, the sixty-second section of the latter act, while repealing the act of 1863, enacted that the repeal should not affect any appointments made, acts done, or proceedings had, or the organization, acts, or proceedings of any association organized, or in the process of organization under the act aforesaid, and gave to such associations all the rights and privileges granted by the act, and subjected them to all the duties, liabilities and restrictions imposed by it, it is, therefore, manifest that it was not the repeal of the thirty-sixth section which caused the by-law to fall. It fell because it was considered a regulation inconsistent with the new Currency Act, the policy of which was to permit no liens in favor of a bank upon the stock of its debtors. It is impossible, therefore, to see why the decision in the case of *The Bank v. Lanier* does not require that the certified question should be answered in the negative.

An attempt was made in the argument to distinguish that case

from the present, by the fact that the articles of association of the Eagle Bank contain the provision to which we have referred, namely, that the directors should have the power to make by-laws which may prohibit the transfer of stock owned by any stockholder who may be a debtor to the association, without the consent of the board, a provision which, it is said, the associates were justified in making by the fifth section of the act of 1864. The argument is, that though the act of Congress does not itself create a lien on a debtor's stock (as did the act of 1863), it does by the words of its fifth section authorize the creation of such a lien by the articles of association, and by by-laws made under them.

This leads to the inquiry whether the fifth section does authorize any provision in the articles of association that by-laws may be made prohibiting the transfer of stock of debtors to a bank, for if it does not, the foundation of the argument is gone.

Certainly, there is no express grant of authority to make such a prohibition contained in that section. There is no specification of such a power, and if such a grant could be implied from the words used by Congress, the implication would be in direct opposition to the policy indicated by the repeal of the thirty-sixth section of the act of 1863, and the failure to re-enact it, as well as by the provisions of the thirty-fifth section, which prohibit loans and discounts by any bank on the security of the shares of its own capital stock, and prohibits, also, every bank from purchasing or holding any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith. Surely an implication is inadmissible which contradicts either the letter or the spirit of the act. Surely, when the statute has prohibited all express agreements for a lien in favor of a bank upon the stock of its debtors, there can be no implication of a right to create such a lien from any thing contained in the fifth section. But were there no such policy manifest in the act, the words of the fifth section would not bear the meaning attributed to them. The articles of association required by that section to be entered into must specify in general terms the object for which the association is formed, and may contain any other provisions not inconsistent with the provisions of the act, which the association may see fit to adopt for the regulation of its business and the conduct of its affairs. To us it seems that a by-law, giving to the bank a lien upon its stock, as against indebted stockholders, ought not to be considered

as a regulation of the business of the bank, or a regulation for the conduct of its affairs. That Congress did not understand the section as extending to the subject of stock transfer is very evident in view of the fact that in another part of the statute express provision was made for such transfers. The eighth section empowers the board of directors of every banking association to define and regulate by by-laws, not inconsistent with the provisions of the act, the manner in which its stock shall be transferred.

This would be superfluous if the power had been previously given in the fifth section. That Congress considered it necessary to make such an enactment is convincing evidence that they thought it had not elsewhere been made. Whatever power, therefore, the directors of a bank possess to regulate transfers of its stock, they derive, not from the fifth section of the act, and not from the articles of association, but from the eighth and twelfth sections by express and direct grant. It cannot, therefore, be maintained that the present case is not governed by the decision made in *Bank v. Lanier*, because the articles of association for the Eagle Bank authorized the directors to make a by-law restricting the transfer of stock. In that case there was a by-law prohibiting the transfer, as in this. Independent of the thirty-sixth section of the act of 1863, there was as much authority to make and enforce such a by-law as is given by the act of 1864. The eleventh and twelfth sections of the act of 1863 enacted that associations formed under it might make by-laws, not inconsistent with the laws of the United States or the provisions of the act, for the transfer of their stock, and that that stock should be transferable on the books of the association "in such manner as might be prescribed in the by-laws or articles of association." These powers given to the associates under that act are quite as large as those given by the act of 1864. Yet this court held that after the passage of the latter act a by-law giving a lien upon a debtor's stock was inconsistent with its provisions and invalid. Of course, if the act destroyed an existing by-law, it must prevent the adoption of a new one to the same effect. We hold, therefore, in the authority of *Bank v. Lanier*, that the first question certified must be answered in the negative, and consequently the same answer must be given to the other two questions.

*Answered in the negative.*

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Tappan v. Merchants' National Bank.

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## TAPPAN, Collector, v. MERCHANTS' NATIONAL BANK.

(19 Wallace, 490.)

*Taxation of stockholders of National banks — Validity of statute providing where tax shall be assessed*

A State statute provided that the stockholders in National banks should be taxed on such stock in the county, town or district within the State where such bank was located, whether such stockholders resided in such town, county or district, or not. *Held* to be constitutional and valid.\*

**A**PPPEAL from the Circuit Court for the Northern District of Illinois.

The action was brought by the Merchants' National Bank of Chicago against Tappan, collector, to enjoin him from collecting taxes upon any of the shares of stock in the said bank assessed under the following statute of the State of Illinois passed in 1867:

"No tax shall be assessed upon the capital of any bank or any banking association, organized under the authority of this State, or organized under the authority of the United States, and located within this State.

"But the stockholders in such banks or banking associations shall be assessed and taxed on the value of their shares of stock therein in the county, town or district where such bank or banking association is located, and not elsewhere, whether such stockholders reside in such town, county, or district, or not, but not any greater rate than is or may be assessed upon other moneyed capital in the hands of individuals in this State."

The Constitution of the State of Illinois at the time provided:

"ARTICLE IX.

"SECTION 2. The General Assembly shall provide for levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to his or her property, such value to be ascertained by some person or persons to

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\* The statute in this case was passed before the act of Congress approved February 10, 1868 (R. S. § 5219), which gave a legislative construction to the words "place where bank is located and not elsewhere." The above decision overrules *Union National Bank v. Chicago*, 3 Biss. 82. See *Van Allen v. The Assessors*, ante, p. 1; *People v. Commissioners*, ante, p. 9; *Bradley v. People*, ante, p. 14; *Austin v. Aldermen*, ante, p. 15; *National Bank v. Commonwealth*, ante, p. 34; *Lionberger v. Rouse*, ante, p. 41; *Hepburn v. School Directors*, post, 113; *People v. Commissioners*, post; *Adams v. Mayor*, post; *Charleston v. People's National Bank*, post; *First National Bank v. Peterborough*, post.

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be elected or appointed in such manner as the General Assembly shall direct and not otherwise.

"SEC. 5. The corporate authorities of counties, townships, school districts, cities, towns, and villages, may be vested with power to assess and collect taxes for corporate purposes, such taxes to be uniform in respect to persons and property, within the jurisdiction of the body imposing the same. And the General Assembly shall require that all the property within the limits of municipal corporations, belonging to individuals, shall be taxed for the payment of debts contracted under authority of law."

The act of Congress of 1864 under which this bank was organized provided as follows :

"SEC. 41. Nothing in this act shall be construed to prevent all the shares in any of the said associations held by any person or body corporate from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority, at the place where such bank is located and not elsewhere ; but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

Some of the shares of stock assessed were held by persons in Chicago where the bank was situated, while other shares were held by persons who did not reside in Chicago, and many were held by persons residing out of the State of Illinois.

The bill filed by the bank, after setting out the facts of non-residence, etc., already stated, and the violation of the Constitution in levying the tax complained of, and a threat of the collector to sell the stock of the bank, if the taxes claimed were not paid, alleged, by way of giving a jurisdiction in equity, that the shareholders refused to pay the taxes and forbade the payment of them by the bank, and threatened a multiplicity of suits against the bank in case it paid them, or in case it deducted the amount thereof from any dividends upon the stock ; that if the collector sold the stock irreparable damage would be done to the stockholders ; that the bank was the trustee of its stockholders, and as such entitled to protect their interests ; and that a sale of their stock would prejudice the bank in the public mind, and work damage to it incapable of remedy at law.

The court below on demurrer to the bill for want of equity, considering that the law of Illinois laying tax was in violation of its

Constitution, decreed an injunction. From that decree this appeal was taken.

*M. W. Fuller*, in support of the decree.

*Mr. J. K. Edsall*, Attorney-General of Illinois, *contra*.

Mr. Chief Justice WAITE delivered the opinion of the court.

We are called upon in this case to determine whether the General Assembly of the State of Illinois could, in 1867, provide for the taxation of the owner of shares of the capital stock of a National bank in that State, at the place, within the State, where the bank was located, without regard to their places of residence. The statute of Illinois, under the authority of which the taxes complained of were assessed, was passed before the act of Congress, approved February 10th, 1868 (15 Stat. at Large, 34), which gave a legislative construction to the words, "place where the bank is located, and not elsewhere," as used in section 41 of the National Banking Act (13 id. 112); and permitted the State to determine and direct the manner and place of taxing resident shareholders, but provided that non-residents should be taxed only in the city or town where the bank was located.

The power of taxation by any State is limited to persons, property, or business within its jurisdiction. State tax on foreign-held bonds (*Railroad v. Pennsylvania*, 15 Wall. 319). Personal property, in the absence of any law to the contrary, follows the person of the owner, and has its situs at his domicile. But, for the purpose of taxation, it may be separated from him, and he may be taxed on its account at the place where it is actually located. These are familiar principles, and have been often acted upon in this court and in the courts of Illinois. If the State has actual jurisdiction of the person of the owner, it operates directly upon him. If he is absent, and it has jurisdiction of his property, it operates upon him through his property.

Shares of stock in National banks are personal property. They are made so in express terms by the act of Congress under which such banks are organized. 13 Stat. at Large, 102, § 12. They are a species of personal property which is, in one sense, intangible and incorporeal, but the law which creates them may separate them from the person of their owner for the purposes of taxation, and give them a situs of their own. This has been done. By section

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41 of the National Banking Act, it is in effect provided that all shares in such banks, held by any person or body corporate, may be included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed under State authority, at the place where the bank is located, and not elsewhere. 13 Stat. at Large, 112. This is a law of the property. Every owner takes the property subject to this power of taxation under State authority, and every non-resident, by becoming an owner, voluntarily submits himself to the jurisdiction of the State in which the bank is established for all the purposes of taxation on account of his ownership. His money invested in the shares is withdrawn from taxation under the authority of the State in which he resides and submitted to the taxing power of the State where, in contemplation of the law, his investment is located. The State, therefore, within which a National bank is situated has jurisdiction, for the purposes of taxation, of all the shareholders of the bank, both resident and non-resident, and of all its shares, and may legislate accordingly.

The State of Illinois thus having had, in 1867, the right to tax all the shareholders of National banks in that State on account of their shares, it remains to consider at what place or places within the State such taxes could be assessed.

It is conceded that it was within the power of the State to tax the shares of non-resident shareholders at the place where the bank was located, but it is claimed that under the Constitution of the State, resident shareholders could only be taxed at the places of their residence. We have not been referred to any express provision of the Constitution to that effect. There is nothing which in terms prohibits the General Assembly from separating personal property within the State from the person of the owner and locating it at appropriate places for the purposes of taxation, but it is insisted that sections 2 and 5 of article 9 of the Constitution of 1848, which was in force when the act of 1867 was passed, contain an implied prohibition.

Section 2 directs that "the General Assembly shall provide for levying a tax by valuation, so that every person or corporation shall pay a tax in proportion to the value of his or her property; such value to be ascertained by some person or persons to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise." Section 5 directs that "the corporate au-

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thorities of counties, townships, school districts, cities, towns, and villages, may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same. And the General Assembly shall require that all property within the limits of municipal corporations belonging to individuals shall be taxed for the payment of debts contracted under authority of law." The corresponding provisions of the Constitution of 1870 are in substance the same.

The object of these sections is to secure uniformity of taxation. That, it is said in *Bureau Co. v. Chicago, B. & Q. R. R. Co.*, 44 Ill. 238, is to be regarded as the cardinal principle, the dominant idea of this article of the Constitution. But uniformity in this connection is only another name for equality, for the provision is for "levying a tax by valuation so that every person and corporation shall pay a tax in proportion to the value of his or her property." The value of the property being ascertained, the same rate of taxation must be laid upon all.

Property is made the constitutional basis of taxation. This is not unreasonable. Governments are organized for the protection of persons and property, and the expenses of the protection may very properly be apportioned among the persons protected according to the value of their property protected.

The Constitution does not undertake to fix the value of the property. Neither does it prescribe any rules by which it is to be fixed. That is left to the General Assembly, for the provision in that respect is, "such value to be ascertained by some person or persons to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise." The mode and manner in which the persons appointed to make the valuation shall proceed, are left to the discretion of the General Assembly. In fact, the whole machinery of taxation must be contrived and put into operation by the legislative department of the government. As part of this machinery taxation districts must be created. All property within the district must be taxed by uniform rate. If property is actually within a district it is but proper that the legislature should provide that it should be listed, valued, and assessed there. In fact, the last clause of section 5, article 9, seems to make that a duty, for it provides that the General Assembly shall require that all property within the limits of municipal corpora-



tions belonging to individuals shall be taxed for the payment of debts contracted under authority of law.

This power of locating personal property for the purpose of taxation without regard to the residence of the owner has been often exercised in Illinois, and sustained by the courts. *City of Dunleith v. Reynolds*, 53 Ill. 45. Since the adoption of the Constitution of 1870, which did not enlarge the powers of the General Assembly in this particular, very extended legislation has been had with a view to such location. Thus, live stock and other personal property used upon a farm must be listed and assessed where the farm is situated ; property in the hands of agents at the place where the business of the agent is transacted ; water craft where they are enrolled ; or, if not enrolled, where they are kept ; the property of bankers, brokers, merchants, manufacturers, and many other classes of persons especially enumerated, at the place where their business is carried on. This became necessary in order that the burdens of taxation might be equally distributed among those who should bear them.

We do not understand the counsel for the appellee to dispute this power, where the property is tangible and capable of having, so to speak, an actual situs of its own, but he claims that if it is intangible, it cannot be separated from the person of its owner. It must be borne in mind that all this property, intangible though it may be, is within the State. That which belongs to non-residents is there by operation of law. That which belongs to residents is there by reason of their residence. All the owners have submitted themselves to the jurisdiction of the State, and they must obey its will when kept within the limits of constitutional power.

The question is then presented whether the General Assembly, having complete jurisdiction over the person and the property, could separate a bank share from the person of the owner for the purpose of taxation. It has never been doubted that it was a proper exercise of legislative power and discretion to separate the interest of a partner in partnership property from his person for that purpose, and to cause him to be taxed on its account at the place where the business of the partnership was carried on. And this, too, without reference to the character of the business or the property. The partnership may have been formed for the purpose of carrying on mercantile, banking, brokerage, or stock business. The property may be tangible or intangible, goods on the shelf or

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debts due for goods sold. The interest of the partner in all the property is made taxable at the place where the business is located.

A share of bank stock may be in itself intangible, but it represents that which is tangible. It represents money or property invested in capital stock of the bank. That capital is employed in business by the bank, and the business is very likely carried on at a place other than the residence of some of the shareholders. The shareholder is protected in his person by the government at the place where he resides ; but his property in this stock is protected at the place where the bank transacts his business. If he were a partner in a private bank doing business at the same place, he might be taxed there on account of his interest in the partnership. It is not easy to see why, upon the same principle, he may not be taxed there on account of his stock in an incorporated bank. His business is there as much in the one case as in the other. He requires for it the protection of the government there, and it seems reasonable that he should be compelled to contribute there to the expenses of maintaining that government. It certainly cannot be an abuse of legislative discretion to require him to do so. If it is not, the General Assembly can rightfully locate his shares there for the purpose of taxation.

But it is said to be a violation of the constitutional rule of uniformity to compel the owner of a bank share to submit to taxation for this part of his property at a place other than his residence, because other residents are taxed for their personal property where they reside. It is a sufficient answer to this proposition to say that all persons owning the same kind of property are taxed as he is taxed. Absolute equality in taxation can never be attained. That system is the best which comes the nearest to it. The same rules cannot be applied to the listing and valuation of all kinds of property. Railroads, banks, partnerships, manufacturing associations, telegraph companies, and each one of the numerous other agencies of business which the inventions of the age are constantly bringing into existence, require different machinery for the purpose of their taxation. The object should be to place the burden so that it will bear as nearly as possible equally upon all. For this purpose different systems, adjusted with reference to the valuation of different kinds of property, are adopted. The courts permit this. Thus, in a case in Illinois, involving the system adopted for the taxation of bank shares, it was said by the Supreme Court

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(*Mc Veagh v. Chicago*, 49 Ill. 329), "in view of this legislation it must be apparent that a system of taxation for bank shares was designed peculiar to itself and independent of the general revenue law of the State;" and the authority of the law was sustained and enforced.

Again, it is said the law in question destroys the uniformity of taxation, because it provides for the collection of the taxes assessed on account of this kind of property in an unusual way. The Constitution does not require uniformity in the manner of collection. Uniformity in the assessment is all it demands. When assessed, the tax may be collected in the manner the law shall provide; and this may be varied to suit the necessities of each case.

Since the decree was rendered in the Circuit Court, the Supreme Court of Illinois has passed upon this same question, and declared the law of 1867 to be constitutional. We might have contented ourselves by acknowledging the authority of this decision, but we are willing not only to acknowledge its authority, but to admit its correctness.

We have not felt called upon to consider whether the General Assembly could, under the provisions of the act of Congress, provide for the taxation of shareholders at any other place within the State than that in which the bank is located. It is sufficient for the purposes of this case that it might tax them there.

Other questions have been discussed in the argument, and among them one which relates to the power of the bank to interfere in behalf of its stockholders in the manner which has been done. We have not deemed it necessary to pass upon any of these questions, as those already decided are conclusive of the case.

Decree reversed, and the cause remanded with instructions to proceed

*In conformity with this opinion.*

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Cadle v. Baker.

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## CADLE v. BAKER.

(20 Wallace, 650.)

*Receiver — debtors cannot impeach appointment of.*

The debtors of a National bank, when sued by a receiver of the bank, cannot inquire into the validity of his appointment.\*

**E**RROR to the District Court for the Middle District of Alabama. Action by Cadle, receiver of the First National Bank of Selma, against Baker, to recover a debt due the bank. The declaration alleged in general terms the appointment of the plaintiff as receiver, and the defendant demurred on the ground that it did not specifically aver each and every thing which was provided for in the National Banking Act as the ground of appointing a receiver. The court below sustained the demurrer and gave judgment for the defendant, whereupon the receiver brought error.

*P. Phillips*, for plaintiff in error.

No opposing counsel.

Mr. Chief Justice WAITE delivered the opinion of the court.

We think such averments as the defendant alleges to be necessary, and the want of which he has assigned for cause of demurrer, were not necessary. The debtors of a bank, when sued by a receiver, cannot inquire into the legality of his appointment. It is sufficient for the purposes of such a suit that he has been appointed and is receiver in fact. As to debtors, the action of the Comptroller in making the appointment is conclusive, until set aside on the application of the bank. The bank may move in that behalf, but the debtor cannot. Section 50 makes express provision for a contest by the bank.

The court below erred in sustaining the demurrer, and for that reason the judgment is reversed and the cause remanded, with instructions to overrule the demurrer to the declaration and

*Proceed accordingly.*

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\* See *Platt v. Beebe*, *post*, affirming *Platt v. Crawford*, 8 Abb. Pr. (N. S.) 297.

## NATIONAL BANK v. COLBY.

(21 Wallace, 609.)

*Attached property of bank cannot be sold after appointment of receiver — Action abates by dissolution of corporation.*

The property of a National bank attached at the suit of an individual creditor, after the bank has become insolvent, cannot be subjected to sale for the payment of his demand, against the claim for the property by a receiver of the bank subsequently appointed.\*

A suit against a National bank to enforce the collection of a demand is abated by a decree dissolving the corporation, and forfeiting its rights and franchises.

ERROR to the Supreme Court of Alabama.

**E** The First National Bank of Selma, organized under the act of June 3, 1864, ceased business on the 16th of April, 1867, and a receiver of its effects was appointed by the Comptroller of the Currency. Subsequently an information was filed by the Comptroller, charging violation of its charter, and a decree was entered in the District Court of the United States forfeiting all the rights, franchises and privileges of the bank and adjudging its dissolution.

On the 17th of April, being the day after the bank ceased business, Colby sued out an attachment in the State court against the bank on a debt alleged to be due him.

On the trial of the attachment suit, the receiver proved his appointment and the decree dissolving the bank, and thereupon moved the court to dissolve the attachment and discharge the levy. This motion was overruled, and the jury gave a verdict for the plaintiff, and the judgment entered thereon was affirmed by the Supreme Court of the State. The case was brought to the Supreme Court of the United States, under section 709 of the Revised Statutes.

*Alexander White, for Colby.*

*P. Phillips and C. Case, contra.*

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\* As to attachments, etc., of National banks, see *Southwick v. First National Bank, post*; *Chesapeake Bank v. First National Bank of Baltimore, post*.

Mr. Justice FIELD delivered the opinion of the court.

Two questions are presented in this case for our determination: 1st, whether the property of a National bank organized under the act of Congress of June 3d, 1864 (13 Stat. at Large, 99), attached at the suit of an individual creditor, after the bank has become insolvent, can be subjected to sale for the payment of his demand, against the claim for the property by a receiver of the bank subsequently appointed; and 2d, whether a suit against a National bank to enforce the collection of a demand is abated by a decree dissolving the corporation, and forfeiting its rights and franchises.

To the first question the act of Congress furnishes an answer in the negative; to the second, the general law respecting corporations gives one in the affirmative.

The act of Congress prescribes the conditions upon which National banks shall be created; the powers they shall possess; and the consequences of their failure to meet their obligations. All persons dealing with these institutions can only acquire and enforce rights against them under the limitations there designated.

The object of the act, as its title imports, was to create a National currency secured by a pledge of the bonds of the United States. And to that end it requires security in government bonds for all notes issued; and in case any bank fails to redeem its notes on demand, it provides for their payment on presentation at the treasury of the United States.

To make good any deficiency which may exist in the proceeds of the bonds to meet the amount expended in paying the notes of a bank the act declares that the "United States shall have a first and paramount lien upon all the assets" of the association. Whatever disposition, therefore, may be made of the property of an insolvent bank, the lien of the United States thereon must exist until the government is fully reimbursed.

As to the general creditors, the act evidently intends to secure equality among them in the division of the proceeds of the property of the bank. The fiftieth section provides for the appointment of a receiver of an insolvent bank, who shall take possession of its assets, collect its debts, and upon the order of a court of record, sell its real and personal property and pay over the money to the treasury of the United States, subject to the order of the Comptroller of the Currency; that the Comptroller shall then advertise for creditors to present their claims against the association, and after making provision for refunding to the United States any

deficiency in redeeming its notes, shall make a ratable dividend of the money on all claims proved to his satisfaction or adjudicated in a court of competent jurisdiction.

The fifty-second section, further to secure this equality, declares that all transfers by an insolvent bank of its property of every kind, and all payments of money made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by the act, or "with the view to the preference of one creditor over another, except in the payment of its circulating notes, shall be utterly null and void."

There is in these provisions a clear manifestation of a design on the part of Congress: 1st, to secure the government for the payment of the notes, not only by requiring in advance of their issue a deposit of bonds of the United States, but by giving to the government a first lien for any deficiency that may arise on all the assets subsequently acquired by the insolvent bank; and 2d, to secure the assets of the bank for ratable distribution among its general creditors.

This design would be defeated if a preference in the application of the assets could be obtained by adversary proceedings. The priority of the United States and the ratable distribution among the general creditors so studiously provided for in the act, would in that case be lost. As justly observed by counsel, if preference was left to the race of diligence, creditors living remote from the location of bank would always be distanced in the contest, and the equality promised to them by the act would be a mere mockery.

It is too late for counsel to question in this court the right of the receiver to appear in the State court and move the discharge of the attachment and the abatement of the suit, or to contest the case at the trial. Whatever informality may have existed in the proceeding, it was waived by the silence of the parties. Objections in matters of form to modes of procedure in the court below cannot be urged here for the first time.

But, independently of this consideration, we are of opinion that it was a proper proceeding on the part of the receiver to apply to the court below to discharge the attachment, on proof of the facts presented by him, and the production of his appointment and the decree dissolving the association. Invested with the rights of the bank to the possession of the property by his appointment, it was

his duty to take the necessary steps to remove the levy. That levy was void as against his claim to the property ; and, in our judgment, it was error for the court to refuse to discharge it on his application.

But, in addition to this, the suit had abated by the decree of the District Court of the United States forfeiting the rights, privileges, and franchises of the corporation, and adjudging its dissolution. The act of Congress provides for such forfeiture whenever the directors themselves violate, or knowingly permit any officers, servants, or agents of the association to violate any of the provisions of the act. The information filed against the bank by the Comptroller of the Currency disclosed several gross violations of the act by the directors ; and the justice and validity of the decree were not questioned in the State court. With the forfeiture of its rights, privileges and franchises the corporation was necessarily dissolved, as the decree adjudged. Its existence as a legal entity was thereupon ended ; it was then a defunct institution, and judgment could no more be rendered against it in a suit previously commenced than judgment could be rendered against a dead man dying *pendente lite*. This is the rule with respect to all corporations whose chartered existence has come to an end, either by lapse of time or decree of forfeiture, unless, by statute, pending suits be allowed to proceed to judgment notwithstanding such dissolution. The prolongation of the corporate life for this specific purpose as much requires special legislative enactment as does the original creation of the corporation. No such enactment is found in the act of Congress authorizing the creation of National banks and prescribing their powers, nor is there any provision elsewhere that we are aware of which would prevent the dissolution of a corporation from working the abatement of a suit pending against it at the time.

“I cannot distinguish,” says STORY, in *Greeley v. Smith*, 3 Story, 658 ; see, also, *Farmers and Mechanics’ Bank v. Little*, 8 Watts & Sargeant, 207, and *Mumma v. The Potomac Company*, 8 Peters, 281, “between the case of a corporation and the case of a private person dying *pendente lite*. In the latter case the suit is abated at law, unless it is capable of being revived by the enactment of some statute, as is the case as to suits pending in the courts of the United States, when, if the right of action survives, the personal representative of the deceased party may appear and



prosecute or defend the suit. No such provision exists as to corporations, nor, indeed, could exist without reviving the corporation *pro hac vice*, and, therefore, any suit pending against it at its death abates by mere operation of law."

Some criticism is made upon the fact that the decree of dissolution was entered on the first of June, when the summons cited the directors before the court on a different day.

It is a sufficient answer to this criticism that no objection of the kind was made to the decree in the court below, nor was its validity questioned. The presumption is, in the absence of such objection, that an answer existed which would have been made had the objection been taken. The decree was admitted in evidence, and the decision of the court was placed on the ground that the provisions of the act of Congress did not interfere with proceedings by attachment, in the State court, nor affect the liability of an insolvent corporation to be thus sued, and "that matter of abatement could not be given in evidence on an issue upon the merits, a default, or a failure to plead;" the court apparently considering the abatement of the attachment, and not the abatement of the suit, as the object sought by the production of the decree.

Judgment reversed, and the cause remanded, with directions to discharge the attachment levied on the property of the bank.

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#### HEPBURN V. THE SCHOOL DIRECTORS.

(23 Wallace, 480.)

*Shares may be taxed at their market value — Effect of exemption of certain moneyed capital.*

Shares of National banks may be taxed, under State laws, at an amount exceeding their par value, if their market value exceed the par value.\*

In one county of a State "all mortgages, judgments, recognizances and money owing upon articles of agreement for the sale of real estate were exempt from taxation except for State purposes." *Held*, that shares of stock in a National bank located in such county could, nevertheless, be lawfully taxed for county, school, municipal and local purposes.

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\* See *People v. Commissioners*, *post*.

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Hepburn v. The School Directors.

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**E**RROR to the Supreme Court of Pennsylvania.

Action by the school directors of the borough of Carlisle to recover a tax assessed for school purposes on 460 shares of stock of the First National Bank of Carlisle, owned by the defendant Hepburn. This tax was assessed under the following act of Assembly of Pennsylvania of March 31, 1870:

"All the shares of National banks, located within this State, shall be taxable for State purposes at the rate of three mills per annum, upon the assessed value thereof, and for county, school, municipal, and local purposes, at the same rate as now is or may hereafter be assessed and imposed upon other moneyed capital in the hands of individual citizens of the State."

Another act of Assembly of the same State provided that in Cumberland county wherein was Carlisle:

"All mortgages, judgments, recognizances, and money owing upon articles of agreement for the sale of real estate, shall be exempt from taxation except for State purposes," etc.

The act of Congress February 10, 1868 (15 Stat. at Large, 34), relating to the taxation of shares in National banks, provided as follows:

"The legislature of each State may determine and direct the manner and place of taxing all the shares of National banks located within said State, subject to the restriction that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

The Supreme Court of Pennsylvania decided in favor of the legality of the tax (79 Penn. St. 759), and Hepburn brought this writ of error.

*Joseph Casey*, for plaintiff in error.

*J. M. Carlisle & J. D. McPherson, contra.*

Mr. Chief Justice WAITE delivered the opinion of the court.

The most important question presented by the assignment of errors is, whether shares of stock in a National bank can be valued for taxation by the State in which the bank is located, at an amount exceeding their par value. It is certain that they cannot be taxed

at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State. Such is the express provision of the act of Congress. It is contended that the term "moneyed capital," as here used, signifies money put out at interest, and that as such capital is not taxed upon more than its par or nominal value, the par value of these shares is their maximum taxable value.

We cannot concede that money at interest is the only moneyed capital included in that term as here used by Congress. The words are "other moneyed capital." That certainly makes stock in these banks moneyed capital, and would seem to indicate that other investments in stocks and securities might be included in that descriptive term.

But even if it was true that these shares can only be taxed as money at interest is, the result contended for would not necessarily follow. The money invested in a bank is not money put out at interest. The money of the bank is so put out and the share of the shareholder represents his proportion of that money. What the amount of this share is, must, in some form, be ascertained in order to determine its taxable value. If the nominal or par value of the stock necessarily indicated this amount, there might be some propriety in making that the taxable value; but, as all know, such is not the case. The available moneyed capital belonging to a bank may be diminished by losses or increased by accumulated profits. Therefore, some plan must be devised to ascertain what amount of money at interest is actually represented by a share of stock. The State of Pennsylvania has provided that this may be done by an official appraisement, taking care to prevent abuses by declaring that such appraisement shall not be higher than the current market value of the stock at the place where the bank is located, and by giving an appeal to the Auditor-General, who is authorized to inquire into the value and correct any errors that may appear. There certainly is no apparent injustice in this. It is not the amount of money invested which is wanted for taxation, but the amount of moneyed capital which the investment represents for the time being.

If the value set upon the share does not exceed this amount it will not be assessed at a greater rate than other money at interest. Other plans may be devised to accomplish the same end, but it is

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sufficient for the purposes of this case that this plan is not unreasonable. If a shareholder is not satisfied with the original appraisement, all he has to do is to appeal to the Auditor-General, make known to him the actual condition of the affairs of the bank, and have the error, if any exists, corrected. Hepburn did not see fit to avail himself of this right which he had. He preferred to rest upon his supposed right, under the act of Congress, to limit the power of assessment to the par value. This right, we think, he did not have.

It is next insisted that no municipal or school taxes could be assessed upon the shares of the First National Bank of Carlisle, a National bank located within the borough of Carlisle, because by the laws of Pennsylvania, as is claimed, other moneyed capital in the hands of individual citizens at that place is exempt from such taxation.

In support of this claim it is shown that all mortgages, judgments, recognizances, and moneys owing upon articles of agreement for the sale of real estate are exempt from taxation in that borough except for State purposes. This is a partial exemption only. It was evidently intended to prevent a double burden by the taxation both of property and debts secured upon it. Necessarily there may be other moneyed capital in the locality than such as is exempt. If there is, moneyed capital, as such, is not exempt. Some part of it only is. It could not have been the intention of Congress to exempt bank shares from taxation because some moneyed capital was exempt. Certainly there is no presumption in favor of such an intention. To have effect it must be manifest. The affirmative of the proposition rests upon him who asserts it. In this case it has not been made to appear.

*Judgment affirmed.*

## FARMERS AND MECHANICS' NATIONAL BANK V. DEARING.

(91 U. S. 29.)

*Usury — National banks are not governed by State laws as to.*

The provisions of the National Banking Act imposing penalties upon National banks for taking usury, supersede the State laws upon that subject.\*

National banks organized under the act are the instruments designed to be used to aid the government in the administration of an important branch of the public service; and Congress, which is the sole judge of the necessity for their creation, having brought them into existence, the States can exercise no control over them, nor in any wise affect their operation, except so far as it may see proper to permit.

**E**RROR to the Court of Appeals of the State of New York.  
The facts are stated in the opinion of the court.

*E. G. Spaulding*, for plaintiff in error. The real question presented in this case is, whether the discount of a note by a National bank, — organized under the act of Congress, approved June 3, 1864, — at a rate of interest then allowed by the statutes of the State where such bank is located, renders it liable to the penalty for usury provided by the State statute.

The act of June 3, 1864, supersedes the State laws imposing penalties for usury in so far as they are applicable to National banks. *Davis, Receiver, & Co. v. Randall*, 115 Mass. 547; *Central National Bank v. Pratt*, id. 539; *Brown v. National Bank of Erie*, 72 Penn. St. 209; *Wiley v. Starbuck*, 44 Ind. 298; *Tiffany v. Missouri State Bank*, 18 Wall. 409; *Citizens' National Bank of Piqua v. Leming*, 8 Int. Rev. Record, 132; *First National Bank of Columbus v. Garlinghouse*, 22 Ohio St. 492; S. C., 10 Am. Rep. 751.

*Thad. C. Davis*, for defendant in error. No privilege of immunity from the usury laws of the State is conferred upon the National banks by the act of Congress of 1864; and a contract for a loan made in the State of New York with one of these organiza-

\* See *Tiffany v. Bank*, ante, p. 90; *Lucas v. Bank*, post; *Central National Bank v. Pratt*, post; *Hintermister v. First National Bank*, post; *Re Wild*, post; *Wiley v. Starbuck*, post; *National Exchange Bank v. Moore*, post; *Davis v. Randall*, post; *Shunk v. Bank*, post; *First National Bank v. Garlinghouse*, post; *Higley v. Bank*, post.

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tions, by which it reserved a greater rate of interest than seven per cent, is void. *First National Bank of Whitehall v. Lamb*, 50 N. Y. 95; S. C., 10 Am. Rep. 438.

Mr. Justice SWAYNE delivered the opinion of the court.

The question presented for our determination involves the construction of the provisions of the National Bank Act of Congress of the 3d of June, 1864 (13 Stat. 99), upon the subject of the interest to be taken by the institutions organized under that act.

The plaintiff in error is one of those institutions. The thirtieth section of the act declares "that every association may take, reserve, and charge, in any loan or discount made, or upon any notes, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State or Territory where the bank is located, and no more; except that where, by the laws of any State, a different rate is limited for banks of issue organized under State laws, the rates so limited shall be allowed for associations organized in any such State under this act. And, when no rate is fixed by the laws of the State or Territory, the bank may take, receive, reserve, or charge at a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. And, in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of interest thus paid from the association taking or receiving the same, provided that such action is commenced within two years from the time the usurious transaction occurred. But the purchase, discount, or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount, or sale at not more than the current rate of exchange for sight drafts, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest.

The facts of the case are few and simple. On the 2d of September, 1874, it was agreed between the parties that Dearing should make his promissory note to one Deitman for \$2,000, payable one month from date, and that the bank should discount the note for

Dearing and at the rate of interest of ten per cent per annum. This agreement was carried out. The bank received the note and paid to Dearing the sum of \$1,981.67. The discount reserved and taken was \$18.33. The rate of interest which the bank was legally authorized to take was seven per cent per annum. The excess reserved over that rate was \$5.50. Dearing failed to pay the note at maturity. The bank thereupon sued him in the Superior Court at Buffalo. He answered, that the agreement touching the discount was usurious, corrupt, and illegal; that it avoided the note; and that he was in no wise liable to the plaintiff. The court sustained this defense, and gave judgment for the defendant.

At a General Term of that court the judgment was affirmed, and the judgment of affirmance was subsequently affirmed by the Court of Appeals.

No searching analysis is necessary to eliminate the several provisions of the section to be considered to develop the true meaning of each, and to draw the proper conclusions from all of them taken together.

(1.) The rate of interest chargeable by each bank is to be that allowed by the law of the State or Territory where the bank is situated.

(2.) When, by the laws of the State or Territory, a different rate is limited for banks of issue organized under the local laws, the rate so limited is allowed for the National banks.

(3.) Where no rate of interest is fixed by the laws of the State or Territory, the National banks may charge at a rate not exceeding seven per cent per annum.

(4.) Such interest may be reserved or taken in advance.

(5.) Knowingly reserving, receiving, or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the interest which the note, bill, or other evidence of debt, carries with it, or which has been agreed to be paid thereon."

(6.) If a greater rate has been paid, twice the amount so paid may be recovered back, provided suit be brought within two years from the time the usurious transaction occurred.

(7.) The purchase, discount, or sale of a bill of exchange, payable at another place, at not more than the current rate of exchange on sight drafts, in addition to the interest, shall not be considered as taking or reserving a greater rate of interest than that permitted.

These clauses, examined by their own light, seem to us too clear

to admit of doubt as to any thing to which they relate. They form a system of regulations. All the parts are in harmony with each other and cover the entire subject.

But it is contended that the phrase, "a rate of interest greater than aforesaid," as it stands in the context, has reference only to the preceding sentence, which relates to banks where no rate of interest is fixed by law ; and that hence it leaves the consequence of usury, where such rate is fixed, to be governed wholly by the local law upon the subject. This, in the State of New York, would, in all such cases, render the contract a nullity and forfeit the debt. Such the Court of Appeals held to be the law of this case and adjudged accordingly. Neither of these views can be maintained. The collocation of the terms in question does not grammatically require such a construction. Viewed in this light, the phrase is as much applicable to both the foregoing clauses as to the next preceding one. The point to be sought is the intent of the law-making power. The offense of usury under this section is as great where the local law does not, as where it does, define the rate of interest. The same considerations apply in both cases. Why should Congress punish in one class of cases, and, so far as its action is concerned, exempt in the other ? Why such discrimination ? The result would be that in Pennsylvania, where the contract would be void only as to the unlawful excess, the bank would lose nothing but such excess ; while in New York under a contract precisely the same, except as to the identity of the lender, the entire debt would be lost to the bank. This would be contrary to the plainest principles of reason and justice.

A purpose to produce or permit such a state of things ought not to be imputed to Congress, unless the circumstances are so cogent as to render that result inevitable.

We find nothing within the scope of the subject of that character. The second proposition—that the State law, including its penalties, would apply if the first proposition be sound—is equally untenable. If the construction contended for were correct, the State law would have no bearing whatever upon the case. The constitutionality of the act of 1864 is not questioned. It rests on the same principle as the act creating the second bank of the United States. The reasoning of Secretary Hamilton and of this court in *McCulloch v. Maryland*, 4 Wheat. 316, and in *Osborne v. The Bank of the United States*, 9 id. 738, therefore, applies. The



National banks organized under the act are instruments designed to be used to aid the government in the administration of an important branch of the public service. They are means appropriate to that end. Of the degree of the necessity which existed for creating them Congress is the sole judge. Being such means, brought into existence for this purpose and intended to be so employed, the State can exercise no control over them, nor in any wise affect their operation, except in so far as Congress may see proper to permit. Any thing beyond this "is an abuse, because it is the usurpation of power which a single State cannot give." Against the National will, "the States have no power, by taxation or otherwise, to retard, impede, burthen, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government." *Bank of the United States v. McCulloch*, *supra*; *Weston and others v. Charleston*, 2 Pet. 449; *Brown v. Maryland*, 12 Wheat. 419; *Dobbins v. Erie County*, 16 Peter, 435.

The power to create carries with it the power to preserve. The latter is a corollary from the former. The principle announced in the authorities cited is indispensable to the efficiency, the independence and indeed to the beneficial existence of the general government; otherwise it would be liable, in the discharge of its most important trusts, to be annoyed and thwarted by the will or caprice of every State in the Union. Infinite confusion would follow. The government would be reduced to a pitiable condition of weakness. The form might remain, but the vital essence would have departed. In the complex system of polity which obtains in this country, the powers of government may be divided into four classes: Those which belong exclusively to the States; those which belong exclusively to the National government; those which may be exercised concurrently and independently by both; and those which may be exercised by the States; but only with the consent, express or implied, of Congress. Whenever the will of the nation intervenes exclusively in this class of cases, the authority of the State retires and lies in abeyance until a proper occasion for its exercise shall recur. *Gilman v. Philadelphia*, 3 Wall. 713; *Ex parte McNeil*, 13 id. 240. The power of the States to tax the existing National banks lies within the category last mentioned. It must always be borne in mind that the Constitution of the United States, "and the laws which shall be made in pursuance thereof," are "the su-

preme law of the land" (Const., art. 6), and that this law is as much a part of the law of each State, and as binding upon it authorities and people, as its own local constitution and laws. In any view that can be taken of the thirtieth section, the power to supplement it by State legislation is conferred neither expressly nor by implication. There is nothing which gives support to such a suggestion.

There was reason why the rate of interest should be governed by the law of the State where the bank is situated; but there is none why usury should be visited with the forfeiture of the entire debt in one State, and with no penal consequence whatever in another. This, we think, would be unreason, and contrary to the manifest intent of Congress.

Where a statute prescribes a rate of interest and simply forbids the taking of more, and more is contracted for, the contract is good for what might be lawfully taken, and void only as to the excess. *Burnhisel v. Fireman, Assignee*, 22 Wall. 170; *Turner v. Calvert*, 12 Serg. & R. 46. Forfeitures are not favored in the law. Courts always incline against them. *Marshall v. Vicksburgh*, 15 Wall. 146. When either of two constructions can be given to a statute, and one of them involves a forfeiture, the other is to be preferred. Vattel, 20th Rule of Construction.

Where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes. *Stafford v. Ingersoll*, 3 Hill, 38; *First National Bank of Whitehall v. Lamb*, 57 Barb. 429.

The thirtieth section is remedial as well as penal, and is to be liberally construed to effect the object which Congress had in view in enacting it. *Gray v. Bennet*, 3 Metc. 522

The forty-sixth section of the Banking Act of February 25, 1863 (12 Stat. 679), declared that reserving or taking more than the interest allowed should "be held and adjudged a forfeiture of the debt or demand." In the act of 1864, the forfeiture of the debt is omitted, and there is substituted for it the forfeiture of the interest stipulated for, if it had only been reserved and the recovery of twice the amount where the interest had been actually paid. In the Revised Statutes of the United States of the 22d of June, 1874 1011, the provisions of the thirtieth section of the act of 1864 are divided into two sections, and the language is so changed as to

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Farmers and Mechanics' National Bank v. Dearing.

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render impossible in that case the same construction as that of the thirtieth section contended for by the counsel of the defendant in error in this case.

In the "act to amend the usury laws of the District of Columbia," of the 22d of April, 1870 (16 Stat. 91), it is provided that six per cent per annum shall be the lawful rate of interest, but that parties may contract for ten per cent; and that, if more than ten per cent be contracted for, the entire interest shall be forfeited, and that only the principal debt shall be recoverable. It is further declared, that, if the unlawful interest has been paid, it may be recovered back, provided it be sued for within a year.

It is declared in the last section that this act shall not affect the Banking Act of 1864. This latter legislation shows the spirit by which Congress was animated in passing the thirtieth section of the act here under consideration, and is not without value as affording light whereby to ascertain the true meaning of that section, if there could otherwise be any doubt upon the subject. This section has been elaborately considered by the highest court of Massachusetts, of Pennsylvania, of Ohio and of Indiana. *Davis, Receiver, v. Randall*, 115 Mass. 547; *Central National Bank v. Pratt*, id. 539; *Brown v. Second National Bank of Erie*, 72 Penn. St. 209; *First National Bank of Columbus v. Gurlinghouse*, 22 Ohio St. 492; *Wiley et al. v. Starbuck*, 44 Ind. 298. In all these cases views were expressed in conflict with those maintained in the *First National Bank of Whitehall v. Lamb et al.*, 50 N. Y. 100. This adjudication controlled the result of the litigation between these parties. Upon reason and authority, we have no hesitation in coming to the conclusion that there is error in the case before us. The plaintiff below was entitled to recover the principal of the note sued upon, less the amount of the interest unlawfully reserved. Whether he was entitled to recover interest upon the amount of the principal so reduced, after the maturity of the note, is a point which has not been argued, and upon which we express no opinion.

The judgment of the Court of Appeals is reversed, and the case will be remanded with directions to

*Proceed in conformity with this opinion.*

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First National Bank of Charlotte v. National Exchange Bank of Baltimore.

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FIRST NATIONAL BANK OF CHARLOTTE V. NATIONAL EXCHANGE  
BANK OF BALTIMORE.

*National banks may take stock in payment of debts.*

(92 U. S. 122.)

A National bank may, in a fair and *bona fide* compromise of a contested claim against it, growing out of a legitimate banking transaction, pay a larger sum than would have been exacted in satisfaction of the demand so as to obtain by the arrangement a transfer of certain stock in railroad and other corporations, it being honestly believed at the time that by turning the stock into money under more favorable circumstances than then existed, a loss might be averted or diminished.

Although National banks are impliedly prohibited from dealing in stocks, yet they may take stock in payment or compromise of a doubtful debt, in order to avoid loss, and with a view to convert the stock into money.

ERROR to the Court of Appeals of Maryland.

**E** Action to recover money. The plaintiff, a National bank, doing business at Charlotte, N. C., desiring to deposit with the Treasurer of the United States, fifty thousand dollars in United States bonds, for the purpose of increasing its capital stock, employed Bayne & Co., of Baltimore, to procure such bonds and deliver them at the treasury. Not having the money to pay for them at the time, the plaintiff sent its president, Wilkes, to Baltimore, with a certificate previously prepared in Charlotte, as follows:

“FIRST NATIONAL BANK OF CHARLOTTE, N. C., }  
CHARLOTTE, Dec. 15, 1865.

“Received on deposit from Bayne & Co., fifty-five thousand United States 5-20 bonds, third issue, payable to the order of themselves on return of this certificate.

“JOHN WILKES,

“President First National Bank, Charlotte, N. C.”

This certificate was delivered by Wilkes to Bayne & Co., in Baltimore; and on the 18th of December, 1865, they, having indorsed the same, deposited it, together with other securities, with the National Exchange Bank of Baltimore, as collateral security for a call loan of \$80,000 then made by that bank to said firm of Bayne & Co.

A few days after the delivery of said certificate, the plaintiff deposited in New York, to the credit of Bayne & Co., a sum sufficient to pay the same, and received, in January, 1866, oral notice

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from them that the certificate was discharged, and subject to its order. In March, 1866, the plaintiff received a written notice to the same effect, but did not apply for the surrender of said certificate. In April following, Bayne & Co. failed; and the plaintiff was then notified by the defendant that it held the certificate of deposit for value, and demanded the delivery of the bonds therein mentioned.

Wilkes, the president, was sent by the plaintiff to Baltimore to negotiate for the return of said certificate. He informed the defendant that it had been satisfied by the payment to Bayne & Co., and disavowed any legal liability on account of same to the defendant. To avoid suit, however, Wilkes offered to pay \$5,000 upon the delivery of the certificate; which defendant refused, but offered to take \$20,000, and threatened suit unless so settled. Wilkes declined to pay this sum, but asked for delay until he could return to Charlotte and consult the directors of his bank. He again returned to Baltimore, and new negotiations for compromise of the controversy between the two banks in regard to their respective rights to the certificate were opened. Wilkes ascertained that the defendant held, among its collaterals from Bayne & Co., a large number of shares of Washington, Alexandria and Georgetown Railroad stocks, the market value of which had been seriously depressed by the failure of Bayne & Co. Having informed himself in regard to the condition of the stock and its supposed value, and after one or two interviews with the president and directors of the defendant, it was finally agreed that the plaintiff should take four hundred shares of the Washington, Alexandria and Georgetown Railroad stock, and one thousand shares of the Maryland Anthracite stock, the same being valued at \$40,000, and one hundred and twenty-five shares of the stock of the plaintiff, valued at \$15,000,—the latter, inasmuch as he was advised that a National bank could not buy its own stock, to be taken by Wilkes himself; thus making \$55,000. Upon the basis of this settlement, the defendant was to deliver to Wilkes the certificate held by it for the \$55,000 United States bonds. The plaintiff paid to the defendant the sum of \$40,000, according to the terms of the above settlement, and received the certificate for one thousand shares coal stock. The four hundred shares of railroad stock were not then delivered, there being a suit about it at the time of the agreement which prevented all transfers; but it was regarded and treated by both parties as belonging to the plaintiff.

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In September, 1869, nearly three years after the date of the settlement, suit was brought by the plaintiff in the Superior Court of Baltimore city, to recover the \$40,000 paid by it to the defendant in pursuance of the arrangement above stated. At the request of the plaintiff, the court granted the following propositions of law:

First, that if the plaintiff agreed to purchase for \$40,000 the railroad and coal stock, and paid that sum, then the court must find for the plaintiff for that amount, provided the court shall find that the defendant knew the plaintiff to be a National bank, and shall further find that the certificate of deposit was delivered up in consequence of said contract, if, by said contract, no part of the \$40,000 was to be paid for the certificate.

Second, that if the plaintiff agreed to purchase the said stock for \$40,000, and Wilkes also agreed to purchase for \$15,000 one hundred and twenty-five shares of plaintiff's stock, and the inducement to both agreements was Wilkes' desire to obtain the certificate of deposit, and he did so obtain it, that does not inure to make the first contract valid, provided the court shall find, that, by the first-mentioned contract, the consideration for which the sum of \$40,000 was to be paid was the railroad and coal stock, and that no part of said sum was to be paid for the certificate of deposit.

Third, that if the plaintiff, in order to compromise the certificate of deposit, agreed to purchase it and the railroad and coal stock for \$40,000, and paid the money, then the plaintiff is entitled to recover so much of said sum as the court shall find was paid for said stock.

The court found for the defendant, and rendered a judgment in its favor, which the Court of Appeals affirmed, whereupon the case was brought here by writ of error.

*J. Upshur Dennis* and *John Scott, Jr.*, for plaintiff in error. The determination of the validity of the transaction involved in this case must necessarily depend upon the construction of the National Banking Law.

The eighth section of that law enumerates the powers which a National bank can exercise. Every other power is as much withheld as if it was in express terms prohibited. *Pearce v. Mad. & Ind. R. R.*, 21 How. 442; *Bank of Augusta v. Earle*, 13 Pet. 587; *Perrine v. Ches. & Del. Canal Co.*, 9 How. 184; *Penn., Del. & Md. Steam Nav. Co. v. Dandridge*, 8 G. & J. 319.

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No clause gives it power to purchase stocks; on the contrary, the authority specifically conferred on it to buy exchange, coin and bullion, raises the conclusive presumption that the omission of that power was intentional. *Expressio unius exclusio alterius*.

Conceding that the two agreements — the one for the abandonment of the claim, and the other for the purchase of stock — may be inseparably united, it is insisted that the court below erred in holding that a power to acquire stocks is incidental to that of providing for the discharge of a disputed claim by way of compromise. Taking any thing from the defendant but a release or a discharge, transcends the limits of necessary powers, and enables a corporation to accomplish indirectly that which was intended to be prohibited. Upon the principle which underlies the opinion of the Court of Appeals, it may be said that a corporation has, as an incident to the power to discharge its indebtedness, that of acquiring the requisite funds; and, as a legitimate means of so doing, the privilege of engaging in business of any kind, provided its real and *bona fide* object is to meet outstanding demands against it, this line of argument would give these creatures of the statute every power, the exercise of which is not in positive terms forbidden.

The true doctrine is, that an implied or incidental power must be deducible from the grant, and fairly within its scope; partake of the same character as the specifically granted powers, but not enlarge them; and tend naturally to secure the same result. A power to discharge may embrace that of making a payment of any kind whatever, but not that of purchasing or acquiring. That is a distinct and substantive power of an entirely different nature. *Pearce v. Mad. & Ind. R. R.*, *supra*; *East Anglican R'y v. Eastern Counties R'y*, 7 Eng. Law & Eq. 508; *Hood v. N. Y. & N. H. R. R.*, 22 Conn. 1; *id.* 502; *Russell v. Topping*, 5 McLean, 197; *Clark v. Farrington*, 11 Wis. 323; *Beatty v. Knowles*, 4 Pet. 167.

The precise proposition involved in this controversy has been decided in *Talmage v. Pell*, 3 Seld. 328. See, also, *Fowler v. Scully*, 72 Penn. St. 461 (*post*); *Shoemaker v. National Mechanics' Bank*, 2 Abb. C. C. 422 (see *post*); *Shinkle v. First National Bank of Ripley*, 22 Ohio St. 516 (see *post*); *Wiley v. First National Bank of Brattleboro*, 47 Vt. 552 (see *post*); *First National Bank of Lyons v. Ocean National Bank*, 60 N. Y. 278 (see *post*).

*William F. Frick, contra.*

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Mr. Chief Justice WAITE delivered the opinion of the court.

The question presented for our consideration in this case is, whether a National bank, organized under the National Banking Act, may, in a fair and *bona fide* compromise of a contested claim against it growing out of a legitimate banking transaction, pay a larger sum than would have been exacted in satisfaction of the demand, so as to obtain by the arrangement a transfer of certain stocks in railroad and other corporations; it being honestly believed at the time that, by turning the stocks into money under more favorable circumstances than then existed, a loss, which would otherwise accrue from the transaction, might be averted or diminished. Such, according to the finding below, was the state of facts out of which this suit has arisen. That finding is conclusive upon us.

A National bank can "exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; and by obtaining, issuing and circulating notes." R. S., § 5136, par. 7; 15 Stat. 101, § 8.

Authority is thus given to transact such a banking business as is specified, and all incidental powers necessary to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the authorized business, and to enable a bank to conduct its affairs, within the general scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others. Its own obligations must be met, and debts due to it collected or secured. The power to adopt reasonable and appropriate measures for these purposes is an incident to the power to incur the liability or become the creditor. Obligations may be assumed that result unfortunately. Loans or discounts may be made that cannot be met at maturity. Compromises to avoid or reduce losses are oftentimes the necessary results of this condition of things. These compromises come within the general scope of the powers committed to the board of directors and the officers and agents of the bank, and are submitted to their



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judgment and discretion, except to the extent that they are restrained by the charter or by-laws. Banks may do, in this behalf, whatever natural persons could do under like circumstances.

To some extent it has been thought expedient in the National Banking Act to limit this power. Thus, as to real estate, it is provided (Rev. Stat., § 5137; 13 Stat. 107, § 28) that it may be accepted in good faith as security for, or in payment of, debts previously contracted; but, if accepted in payment, it must not be retained more than five years. So, while a bank is expressly prohibited (§ 5201; 13 Stat. 110, § 35) from loaning money upon or purchasing its own stock, special authority is given for the acceptance of its shares as security for, and in payment of, debts previously contracted in good faith; but all shares purchased under this power must be again sold or disposed of at private or public sale within six months from the time they are acquired.

Dealing in stocks is not expressly prohibited; but such a prohibition is implied from the failure to grant the power. In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in payment and satisfaction, with a view to their subsequent sale or conversion into money so as to make good or reduce an anticipated loss. Such a transaction would not amount to a dealing in stocks.

It was, in effect, so decided in *Fleckner v. Bank U. S.*, 8 Wheat. 351, where it was held that a prohibition against trading and dealing was nothing more than a prohibition against engaging in the ordinary business of buying and selling for profit, and did not include purchases resulting from ordinary banking transactions. For this reason, among others, the acceptance of an indorsed note in payment of a debt due was decided not to be a "dealing" in notes. Of course, all such transactions must be compromises in good faith, and not mere cloaks or devices to cover unauthorized practices.

It is difficult to see how a debt due from, or a contested obligation resting upon a bank, occupies any different position in respect to this power of adjustment and compromise from that of a debt owing to it. The object in both cases is to get rid of or reduce an apprehended loss growing out of legitimate business; and it would seem that whatever might be done in the one case ought not to be excluded from the other under the same circumstances. Often a discharge by a bank of its own obligation creates a debt due to it

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People v. Commissioners of Taxes and Assessments.

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from another. Such was the case here. Bayne, without authority, transferred to the defendant, as collateral security for his indebtedness, a certificate of deposit issued to him by the plaintiff, and afterward collected the money due upon the certificate from the plaintiff without disclosing the transfer. Any payment by the plaintiff to the defendant, therefore, in discharge of its liability upon the certificate, became a lawful charge against Bayne. He was insolvent. It was, on this account, not only the right, but the duty of the officers and agents of the plaintiff, to protect by their arrangements, as far as possible, the stockholders whose interests they represented. This was necessarily left to their judgment and discretion. No question of good faith is involved. The transaction for all the purposes of this suit must be taken to have been, in fact, what it purports to be,—a fair and honest compromise of an outstanding claim, with a view to ultimate protection against an impending loss. As such, we think it was within the corporate powers of the bank, and that the Court of Appeals did not err in so holding.

*Judgment affirmed.*

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PEOPLE V. COMMISSIONERS OF TAXES AND ASSESSMENTS.

(94 U. S. 415.)

*Bank shares to be taxed at their market value.*

The shares of stock of a National bank in New York should be taxed at their market value.\*

IN error to the Court of Appeals of New York.  
The proceedings were instituted to review an assessment made by the respondents. The opinion states the facts.

*Daniel D. Lord*, for the plaintiff in error.

*Hugh L. Cole*, contra.

Mr. Justice HUNT delivered the opinion of the court.

The relators complain that their shares of stock in the Gallatin

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\* See *Hepburn v. School Directors*, ante, p. 113.

National Bank are assessed at too large a sum. They appeal from the judgment of the Court of Appeals sustaining the determination of the commissioners of taxes, which fixed the taxable value of such shares at \$59 each, whereas the par or nominal value of such shares is \$50 each.

Many grave questions were discussed by the counsel upon the argument, to which we do not think it necessary to refer. We place our judgment upon a single ground.

The laws of the State of New York provide that shares of stock like those we refer to shall be assessed "on the value" of the shares, and at "their full and true value, as they (the assessors) would appraise the same in payment of a just debt due from a solvent debtor," deducting the proportional value of the real estate owned by the bank. 2 Stat. N. Y. 1866, p. 1647, ch. 71; 1 R. S. N. Y. 393, § 17.

The assessors were justified, under this authority, in fixing the value as we have stated. The appraisal included the reserve fund, which is as much a part of the property of the bank, and goes to fix the value of shares, equally as if it were not called by that name, but remained as a part of the specie, bills discounted, or other funds of the bank, undistinguished from the general mass.

The forty-first section of the act of Congress of June, 1864, provides that the States may tax the shares of National banks, subject to two restrictions: 1st. That this taxation shall not be "at a greater rate than is assessed upon other moneyed capital in the hands of the individual citizens of such State;" and, 2d, "that the tax so imposed . . . . shall not exceed the rate imposed upon the shares of any of the banks organized under the authority of the State where such association is located." 13 Stat. 112. In *Hepburn v. The School Directors*, this court decided that, in making assessment of bank shares by this authority, it was competent to assess them at an amount above their par value. 23 Wall. 480.

But the relators insist that, by the act of the legislature of the State of New York, passed March 9, 1865, it was enacted that the shares of a bank could not be assessed at an amount greater than the par value thereof, and that such statute created a contract with the banks organized under the same, which could not be altered by a subsequent legislature. Hence, it is argued that the act of 1866, authorizing such shares to be assessed at a rate which may

exceed their par value, is a law impairing the obligation of a contract, and is void.

The section of the statute of 1865 referred to is as follows, viz.:

"SECTION 10. All the shares in any of the said banking associations, organized under this act, or the act of Congress \* \* \* held by any person or body corporate, shall be included in the valuation of the personal property of such person or body corporate or corporation, in the assessment of taxes in the town or ward where such banking association is located, and not elsewhere, whether the holder thereof reside in such town or ward, or not; but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals of this State. Provided, that the tax so imposed upon such shares shall not exceed the par value thereof; and provided further, that the real estate of such associations shall be subject to State, county or municipal taxes, to the same extent, according to its value, as other real estate is taxed."

Had this been a valid statute, we might have been called upon to discuss the point raised. But it was held in *Van Allen v. The Assessors*, 3 Wall. 573, that this statute was fatally defective, in that it did not contain a proviso that the tax thereby authorized to be imposed should not exceed the rate imposed upon banks organized under the authority of the State. The system of taxation devised by the statute of 1865 was adjudged to be illegal and void.

The clause now laid hold of by the relators was simply a proviso or qualification of that system. It necessarily fell with it. When the main idea was thrown out of existence, the subordinate parts, which were adjuncts of and dependent upon the main theory, ceased to exist. There never was, legally speaking, any such proviso or enactment as the relators claim the benefit of. Of course, there could be no such thing as a violation of contract contained in a proviso which never existed. *Warren v. The Mayor*, 2 Gray, 98, 99; *Sedgwick on Statutes*, 413, 414 (ed. of 1874).

*Judgment affirmed.*

## NATIONAL BANK OF COMMONWEALTH V. MECHANICS' NATIONAL BANK.

(94 U. S. 437.)

*Interest on deposits after demand and refusal — Nature of claim for deposits.*

A National bank, holding deposits, refused to pay the same on demand and thereafter a receiver was appointed. *Held*, that the depositor was entitled to interest thereon from the date of the demand.\*

The entire principal of the deposits, but no interest thereon, was paid by the receiver. *Held*, that interest upon the aggregate of unpaid interest was recoverable.

The claims of depositors in a suspended National bank are, when proved to the satisfaction of the Comptroller of the Currency, on the same footing as if they were reduced to judgments.

**E**RROR to the Circuit Court of the United States for the Southern District of New York.

*Solicitor-General Phillips*, for plaintiff in error.

*William S. Opdyke*, *contra*.

Mr. Justice SWAYNE delivered the opinion of the court.

This suit was brought by the defendant in error as an original claimant, and as the assignee of other parties.

All the claims have a common origin, and involve the same principle.

On the 22d of November, 1873, the Bank of the Commonwealth refused to pay its circulating notes on demand, and became in default. The Comptroller of the Currency appointed a receiver, and the bank has since been in his hands. The Mechanics' Bank and its assignors had funds on deposit. On the 24th of September, 1873, all the parties demanded payment. Nothing was paid.

Installments on account of the principal debts were subsequently paid from time to time to each of the parties. On the 20th of November, 1874, the last installment was paid in each case, and the principal debts were thereby extinguished. At each payment, interest from the 24th of September, 1873, on the amount so paid was demanded and refused. The other parties assigned to the defendant in error their claims respectively for such interest. The

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\* See *Chemical National Bank v. Bailey*, *post*.

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Mechanics' Bank instituted this suit. The declaration demands the payment of this interest in all the cases, with interest upon the aggregate amount from the 20th of November, 1874. The Bank of the Commonwealth demurred. Judgment was given against it, and this writ of error was thereupon prosecuted.

Two errors are assigned:

1. That the plaintiff below was not entitled to recover any interest.

2. If interest was recoverable, as demanded on each installment when paid, the plaintiff was not entitled to interest on the gross amount of such interest from the 20th of November, 1874, the time when the last installments of the principal were paid.

There is but one demurrer, and that is to the whole declaration. The point is, therefore, well taken by the counsel for the defendant in error, that if any part of the declaration be good, and divisible in its nature from the residue, the demurrer must be overruled. 1 Chitty's Plead. 664. But the view which we take of the case renders it unnecessary to apply this rule.

By the common law, interest could in no case be recovered. As early as the reign of King Alfred, in the ninth century, it was held in detestation. Church men and laymen alike denounced it. Glanville, Fleta, and Bracton all speak of it in terms of abhorrence. The first English statute upon the subject was the 37 Hen. VIII, ch. 9.

This statute fixed the lawful rate of interest at ten per cent per annum, and visited receiving more with forfeiture and imprisonment. Other statutes regulating the subject were passed in later reigns from time to time, until finally an act of Parliament in 1854 (17 and 18 Vict., ch. 90), swept all the usury laws in the English statute books out of existence, and established "free trade in money." The first impulse to public opinion in this direction was given by Bentham, near the close of the last century. The final result was doubtless largely due to his labors.

The fiftieth section of the National Banking Act (13 Stat. 113), requires the Comptroller of the Currency to apply the moneys paid over to him by the receiver "on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction." The act is silent as to interest upon the claims before or after proof or judgment. Can it be doubted that a judgment, if taken, would include interest down to the time of its rendition?

Section 996 of the Rev. Stat. p. 182, declares that all judgments in the courts of the United States shall bear the same rate of interest as judgments in the courts of the States respectively where they are rendered. Interest is allowed by the law of New York upon judgments from the time they are perfected. Rev. Code of N. Y. (ed. 1859), vol. III, p. 637.

If these claims had been put in judgment, whether in a court of the United States or in a State court of that State, the result as to interest upon the judgment would have been the same. It was unnecessary to reduce them to judgment, because they were proved to the satisfaction of the Comptroller. After they were so proved, they were of the same efficacy as judgments, and occupied the same legal ground. Hence, they are within the equity, if not the letter of these statutes, and bear interest as judgments would have done. Sedgw. on Constr. 311, 315. This is conclusive upon the first assignment of error.

The rule settled by this court as to the application of payment is, that the debtor or party paying the money may, if he chooses to do so, direct its appropriation; if he fail, the right devolves upon the creditor; if he fail, the law will make the application according to its own notions of justice. Neither of the parties can make it after a controversy upon the subject has arisen between them, and *a fortiori* not at the trial. *United States v. Kirkpatrick*, 9 Wheat: 720; *United States v. January*, 7 Cranch, 572; *Field v. Holland*, 6 id. 8. In the present case, the appropriation was made unequivocally by the party from whom the money was received. How it would have been applied by the law if neither of the parties had given any direction is a question which we need not, therefore, consider.

The interest lawfully accruing upon each of the claims was as much a part of it as the original debt. The creditor had the same right to the payment of the one as of the other. If there had been a judgment, and the full amount due upon it had not been paid, an action of debt might have been brought upon it to recover the balance. 1 Chitty's Plead. 111.

Such balance would have been adjudged to the plaintiff with interest in the shape of damages for the detention of the debt. If, in that case, the judgment debtor had chosen to pay only the principal of the judgment, leaving the interest unsatisfied, and the suit had been for the balance, consisting of interest only, the same result would have followed.

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We have shown that the claims, when proved to the satisfaction of the Comptroller, were upon the same footing as if they had been in judgment. The amount in arrear was liquidated, and as certain as if it consisted wholly of principal instead of interest. This action was, therefore, well brought. If it had been in debt, damages would have been awarded for the detention of the debt sued for. The action not being in debt, the same amount was properly included in the mass of the damages for which the judgment was rendered.

The compounding of interest, so far as it has occurred, was due entirely to the fault of the agent of the plaintiff in error. The principle of estoppel *in pais* applies. No exception can be taken upon that ground.

The plaintiff in this action was entitled, *ex equo et bono*, to the money sought to be recovered. Where the right to recover exists in this class of cases, it includes interest as well as principal, unless there is something which would render the payment of the former inequitable.

KENT, C. J., said upon this subject: "Each case will depend upon the justice and equity arising out of its peculiar circumstances to be disclosed at the trial. *Pease v. Barber*, 3 Caines, 265; see, also, *Robinson v. Bland*, 2 Burr. 1087.

In the latter case, Lord MANSFIELD said: "The interest is an accessory to the principal; and the plaintiff cannot bring a new action for any interest grown due between the commencement of his action and the judgment in it. \* \* \* I don't know of any court in any country (and I have looked into the matter) which don't carry interest down to the last act by which the sum is liquidated."

The treasury authority fell into an error; there should have been no discrimination between principal and interest in making the payments. The creditor had the same right with respect to both as if he had been pursuing the defaulting debtor under other circumstances. The Comptroller should have done just what the law would have done if the case had not come under his cognizance.

Numerous cases, both English and American, are to be found in which compound interest, under special circumstances, was recovered. It is sufficient to refer to a few of them: *Ex parte Beavans*, 9 Ves. Jr. 223; *Caliot v. Walker*, 2 Anstr. 495; *Hamilton v. Le-*



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*Grange*, 2 H. Black. 145 ; *Kellogg v. Hickok*, 1 Wend. (N. Y.) 521 ; *Tylee v. Yates*, 3 Barb. (N. Y.) 222 ; *Aurora City v. West*, 7 Wall. 82 ; *Town of Genoa v. Woodruff et al.*, 92 U. S. 502.

The demand for the interest was properly made upon the plaintiff in error.

*Judgment affirmed.*

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 WAITE V. DOWLEY.

(94 U. S. 527.)

*State statute requiring cashier to send list of shareholders to town clerks valid.*

A State statute required, under a penalty for his neglect or refusal, the cashier of each National bank within the State to transmit annually to the clerks of the several towns in which any stock or shareholder should reside, a true list of the names of such stock or shareholders on the books of such banking association, together with the amount of money actually paid in on each share. *Held*, that the statute was valid.

**E**RROR to the Supreme Court of Vermont. A statute of Vermont provided as follows:

“ An act providing for taxing stock in the several banking associations in this State formed under the act of Congress approved June 3, 1864, entitled ‘ An act to provide a National currency.

“ SECTION 1. It shall be the duty of the cashiers of the several banking associations in this State, formed under the act of Congress approved June 3, 1864, entitled ‘ An act to provide a National currency,’ and the cashiers of all other banks in this State, to transmit to the clerks of the several towns in this State in which any stock or shareholders of such banking association shall reside, a true list of the names of such stock or shareholders on the books of such banking association, together with the amount of money actually paid in on each share on the first day of April in each year, and hereafter, on or before the fifteenth day of April in each year.

“ SEC. 2. The stock and shares of all such banking associations shall be set in the list, and taxed in the same manner that the stock in the several banks in this State, which are chartered under the authority of this State, are liable to be taxed by the existing laws thereof.

“ SEC. 3. If any of the stock of such banking associations is owned by, or stands in the name of, any person residing out of this State, it shall be the duty of the cashier of such banking association to transmit to the clerk of the

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town in which such banking association is situated, the names of all such non-resident stock or shareholders, with the number of shares standing against the name of each of such stock or shareholders on the books of such banking association, together with the amount of money actually paid in on each share on or before the fifteenth day of April in each year.

"SEC. 4. Whenever the collector in any town in which any such banking association is situated shall have a tax against any stock or shareholder in such banking association who is not a resident of this State, it shall be the duty of the cashier of such banking association, upon the presentation of such tax to him by such collector, to pay the same, and charge the same to such stock or shareholder on the books of such banking association, and all dividends due and becoming due upon the same shall be holden to such banking association for the payment of such tax.

"SEC. 5. If any cashier shall neglect or refuse to make returns to any town in this State, as provided in this act, he shall forfeit and pay to the treasurer of such town, for the benefit of such town, the sum of \$500, to be recovered by an action on the case, in the name of such treasurer, founded on this statute."

This action was brought in March, 1870, in the County Court of Windham county, Vermont, by Dowley, as treasurer of the town of Brattleboro, against Waite, the cashier of the First National Bank of Brattleboro, to recover the penalty prescribed by the fifth section of the foregoing act, for refusing, in 1866 and 1867, to make to that town the returns provided for in the first section.

The only defense set up at the trial was, that as the bank was organized under the law of Congress, Waite, as such cashier, was amenable to no law but that, and that the State had not power to prescribe or define his duties as such cashier.

Waite also offered evidence tending to show, that at all times during the years in question, the bank kept such lists of its stockholders as the act of Congress requires, which were open to the inspection of the trustees of said town, who were permitted at all times to transcribe therefrom, and set in the grand list of the town all such stock of said bank as they deemed taxable.

Dowley waived all objection to the admission of the evidence, but claimed that, if admitted, it constituted no legal defense to the action.

The court thereupon directed a verdict for Dowley, which was taken.

To the decision, Waite duly excepted; his exceptions were allowed, and the cause passed to the Supreme Court for review.

That court rendered a decision affirming the judgment of the

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County Court, and giving judgment for Dowley against Waite for the amount of the verdict with subsequent interest.

Waite thereupon brought this writ here, assigning for error that the Supreme Court of Vermont erred,

First. In holding that the statute of the State was valid under the Constitution of the United States, as not repugnant to nor in conflict with the acts of Congress providing for the organization and management of National banks, being the acts of March 25, 1863, and June 3, 1864.

Second. In rendering judgment against him for the penalties provided by a statute which is invalid, or repugnant to and in conflict with said acts of Congress.

*E. J. Phelps*, for plaintiff in error.

*Charles N. Davenport*, contra.

Mr. Justice MILLER delivered the opinion of the court.

This is a writ of error to the Supreme Court of the State of Vermont, and, as is frequent in writs to the State courts, it is objected that there is no jurisdiction.

The plaintiff in error was cashier of a National bank in that State, and the judgment which this writ brings here for review was rendered against him for penalties imposed by a statute of that State, for his refusal to transmit to the clerk of the town of Brattleboro, a true list of the shareholders of the bank who resided in that town, with the number of shares held, and the amount paid on said shares. The record shows that "the defendant's counsel claimed in defense, that, as said bank was organized under the law of Congress referred to in plaintiff's declaration, the defendant, as such cashier, was amenable to no law but said law of Congress, and that the State legislature had not power to prescribe or define his duties as such cashier." That this proposition raises what is called a Federal question, within the meaning of the act of 1867, admits of no doubt. We are also of opinion that no judgment could have been rendered against the defendant in the State courts, without holding, and in effect deciding that this plea was bad; for, if the State could not impose the duty of making such a list on the cashier, by reason of the act of Congress or the Constitution of the United States, then the defendant was guilty of no offense, and the

judgment is for that reason erroneous. This plain proposition cannot be evaded by any opinion delivered by the Supreme Court of that State. This court, therefore, has jurisdiction.

And the single question raised by the record is whether the statute of the State is void which requires the cashier of each National bank within the State, and the cashiers of all other banks, to transmit to the clerks of the several towns in the State in which any stock or shareholder of such banking association shall reside, a true list of the names of such stock or shareholders, with the number of shares standing against the name of such share or stockholder on the books of such banking association, together with the amount of money actually paid in on such share on the first day of April.

The proposition on which this statute is asserted to be void is that Congress has legislated upon the same subject, and that, when there exists a concurrent right of legislation in the States and in Congress, and the latter has exercised its power, there remains in the States no authority to legislate on the same matter. It is not necessary to dispute that proposition, nor, when stated in this general language, can it be controverted. It is none the less true, however, that the line which divides what is occupied exclusively by any legislation of Congress from what is left open to the action of the States is not always well defined, and is often distinguished by such nice shades of difference on each side as to require the closest scrutiny when the principle is invoked, as it is in this case.

We have more than once held in this court that the National banks organized under the acts of Congress are subject to State legislation, except where such legislation is in conflict with some act of Congress, or where it tends to impair or destroy the utility of such banks, as agents or instrumentalities of the United States, or interferes with the purposes of their creation.

This doctrine was clearly and distinctly announced in *National Bank v. Commonwealth*, 9 Wall. 353; and that case has been often referred to since, with approval, in this court.

The statute of Kentucky required "the cashier of a bank whose stock is taxed to pay into the treasury the amount of the tax due. If not he was to be liable for the same, with twenty per cent upon the amount." The stock thus to be taxed was, as in the present case, the stock of the shareholders, as authorized by the act of Congress; and that statute went a step further than to require a

list of the names of these shareholders and the amount of their stock, and obliged the cashier to collect the tax out of the dividends, and pay it over to the State.

The precise point raised here was taken there and overruled by this court; namely, that the laws of the State could impose no such duty on the banks organized under the laws of the United States. The case is directly and conclusively in point.

It seems to have been supposed that, because Congress has required of each National bank that a list of its stockholders shall be kept posted up in some place in their business office, this covers the same ground as that covered by the Vermont statute.

The act of Congress, however, was merely designed to furnish to the public dealing with the bank a knowledge of the names of its corporators, and to what extent they might be relied on as giving safety to dealing with the bank. It had no such purpose as the Vermont statute, and was wholly deficient in the information needed for the purposes of taxation by the State, as conceded to it by the act of Congress itself.

Some legislation of Vermont was, therefore, necessary to the proper exercise of the rightful powers of the State, and, so far as it required this list, was not in conflict with any provision of the act of Congress.

This leads to the second objection to the validity of the State statute, namely, that its purpose was to tax bank shares at other places than those where the bank was located.

This case does not raise that question.

1. Because the bank whose cashier is the plaintiff in error was located in the town of Brattleboro', and the judgment against him is for refusing to deliver the list of shareholders to the clerk of that town, and not for his refusal to deliver such a list to any other town. The delivery to this clerk of a list of the shareholders in that town would have been in aid of the taxation of the shares at the place where the bank was organized and did business, and such taxation is legal within the narrowest definition of the act of Congress.

2. But if it be true that so much of this statute as is supposed to authorize other towns in which shareholders reside to tax such shares is unconstitutional, that does not invalidate the part of it we have been considering. It will be time enough to decide the provision of the State law authorizing such taxation unconstitu-

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tional when an attempt is made to collect such a tax, and the party resisting it shall bring the question here. His rights are not affected by the acts demanded of the cashier; and the latter has no right to make a case for him in advance. This court does not sit here to try most cases to solve a question which may never be raised by any party entitled to raise it.

*Judgment affirmed.*

## CASEY V. GALLI.

(94 U. S. 673.)

*Insolvent National banks — Liability of stockholders, how enforced.*

The order of the Comptroller of the Currency determining to what extent the individual liability of the stockholders of an insolvent National bank shall be enforced, is conclusive on the stockholders; and the amount bears interest from the date of the order.\* *Kennedy v. Gibson, ante*, p. 17, approved.

When the order is to collect the full amount of the par of the stock, the action therefor must be at law, and in such action the stockholder is estopped from denying the existence or the validity of the corporation; the certificate of the Comptroller is conclusive as to the validity of the organization of such corporation.

No authority from a State is necessary to enable a State bank to become a National bank

**A**CTION at law brought in the Supreme Court of the United States by the Receiver of the New Orleans National Banking Association to enforce the individual liability of the defendant as a stockholder in said bank.

The opinion states the case.

*Charles Case*, for plaintiff.

*J. W. McPherson*, for defendant.

Mr. Justice SWAYNE delivered the opinion of the court.

The declaration avers as follows: On and before the third day of June, 1864, the Bank of New Orleans was a banking corporation organized under the laws of the State of Louisiana, and as such carried on the business of banking until about the first day of July, 1871, when the bank, by due proceedings under the act of

\*This case overrules *Bowden v. Morris*, 1 Hughes, 378.

Congress, entitled, "An act to provide a National currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864, became a National banking association under said act of Congress, and as such took the name and style of the "New Orleans National Banking Association," and carried on the business of banking until the fourth day of October, 1873, when it failed and suspended payment.

Thereupon the Comptroller of the Currency, after due proceedings had, appointed a receiver for the association, and it was put in liquidation under the act of Congress before mentioned and the acts amending it, and the plaintiff is such receiver, being lawfully appointed under the said act. By the conversion of the bank of New Orleans into such banking association, every holder of the shares of the capital stock of said Bank of New Orleans became a shareholder of the capital stock of said New Orleans Banking Association to the amount of his shares, and as such subject to the liabilities imposed by said act of Congress on such shareholders. There is owing by the association to its creditors large sums of money. Its assets are insufficient to pay its debts. It has become necessary, in order to pay the debts, to enforce the liability of the shareholders. The Comptroller has decided that this shall be done. On the seventh day of June, 1875, by his order in writing, he required the plaintiff, as such receiver, to enforce such liability against each stockholder to the amount of the par value of his stock held at the time of the failure of the association. The capital stock of the association was \$600,000, divided into twenty thousand shares of the par value of \$30 each.

The defendant is an alien, a subject of the Kingdom of Italy, and vice-consul, etc. At the date of the failure of the association he was the owner of fifty shares of the capital stock of the par value of \$30 for each share. By reason thereof he is liable to pay the sum of \$1,500. He has been specially requested to pay that sum, and has refused to do so. The plaintiff is, therefore, entitled by force of the statute to recover the said sum of \$1,500, with interest at the rate of five per cent per annum.

It was agreed by the parties that demurrers, pleas, replications, and other pleadings might be filed without reference to the order in which they were properly pleadable.

The defendant demurred to the declaration, and assigned the following causes :

1. That the defendant is bound to contribute ratably, and that the proper amount can be ascertained only in equity.

2. That the defendant is bound to contribute ratably to pay a large sum; that this sum is not stated in the declaration, and hence what would be ratable and proper does not appear.

3. That the obligation of the defendant is to pay into the hands of the Comptroller of the Currency, a ratable portion of the debts of the association proved before him, and that the declaration does not show that any debts had been so proved.

4. That the declaration demands a larger sum than the defendant is required by the statute to pay, and also an additional sum by way of interest.

In regard to the first three of these objections, it is sufficient to say that *Kennedy v. Gibson and others*, 8 Wall. 498, is conclusive against them. It is there said that the amount to be paid rests in the judgment and discretion of the Comptroller; that his determination cannot be controverted by the stockholders in suits against them; and that, when the order is to collect the full amount of the par of the stock, the suit must be at law. It is unnecessary to reproduce the reasoning of the court in support of these propositions. The sum to be paid being liquidated, and due and payable when the Comptroller's order was made, it follows that the amount bears interest from the date of the order. Otherwise there would be no motive to pay promptly, and no equality between those who should pay then and those who should pay at the end of a protracted litigation. The defendant filed three pleas in abatement:

1. *Nul tiel* corporation.

2. That there was not then, nor when the plaintiff was appointed, such supposed receiver of said New Orleans Banking Association, nor before, nor since that time, any such corporation in existence, because the Bank of New Orleans had no power by its charter, nor authority otherwise from the State of Louisiana, to change its organization to that of a National banking association, under the laws of the United States; wherefore it was prayed that the declaration be quashed.

3. That there was not then, nor when the plaintiff was appointed such supposed receiver of the New Orleans Banking Association, nor before nor since that time, any such corporation in existence, because the owners of two-thirds of the capital stock of the Bank of New Orleans did not authorize the bank to be converted into a



National banking association under the laws of the United States, nor to accept an organization certificate as such banking association; wherefore it was prayed that the declaration be quashed.

The plaintiff filed a joint demurrer to all these pleas. At the argument the first plea was abandoned. The other two remain to be considered.

The pleas were properly framed in abatement, and not in bar. *Jones v. The Bank of Tennessee*, 8 B. Monr. (Ky.) 122; *Woodson v. The Bank of Gallipolis*, 4 id. 203.

The second plea is clearly bad. No authority from the State was necessary to enable the bank so to change its organization. The option to do that was given by the forty-fourth section of the Banking Act of Congress. 13 Stat. 112. The power there conferred was ample, and its validity cannot be doubted. The act is silent as to any assent or permission by the State. It was as competent for Congress to authorize the transmutation as to create such institutions originally.

The third plea is also bad. The eighteenth section of the act requires the Comptroller to make a careful examination in all cases of original applications, and, if he found the association was "lawfully entitled to commence the business of banking," he was to give a certificate to that effect; and it is declared that the association "shall transact no business except such as is incidental to its organization, and necessarily preliminary, until authorized by the Comptroller of the Currency to commence the business of banking." 13 Stat. 101. A like examination and certificate are required by the forty-fourth section, where an existing bank organizes under the act. That section provides "that when the Comptroller shall give to such association a certificate, under his hand and official seal, that the provisions of this act have been complied with, and that it is authorized to commence the business of banking under it, the association shall have the same powers and privileges and shall be subject to the same duties, responsibilities, and rules, in all respects, as are provided in this act for associations organized under it." 13 Stat. 113.

The declaration avers that the association became such by due and regular proceedings under the act. The plea denies the regularity of the proceedings in the single particular that the owners of two-thirds of the capital stock of the bank did not authorize the directors of said bank to convert it into a National banking asso-

ciation, nor to accept an organization certificate as such banking association. According to the law of pleading, what is not denied is conceded. The giving of the Comptroller's certificate is covered by the averment in the declaration, is not denied by the plea, and is, therefore, to be taken as admitted. The plea proposes to go behind the certificate, and contradict it. This cannot be done. The Comptroller was clothed with jurisdiction to decide as to the completeness of the organization, and his certificate is conclusive upon the subject for all the purposes of this litigation.

It has the same effect, and for the same reason, as his determination and order with respect to the amount to be collected from each stockholder in the event of the failure of the association. No question can be raised in this collateral way as to either.

In *Thatcher v. The West River National Bank*, 19 Mich. 196, it was held that whether there was any defect in the process of organization was a question for the Comptroller to decide, and that "his certificate of compliance with the act of Congress removes any objection which might otherwise have been made to the evidence upon which he acted."

In this we concur.

There is another ground upon which both pleas must be held bad. Where a shareholder of a corporation is called upon to respond to a liability as such, and where a party has contracted with a corporation, and is sued upon the contract, neither is permitted to deny the existence or the legal validity of such corporation. To hold otherwise would be contrary to the plainest principles of reason and of good faith, and involve a mockery of justice. Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made appear to exist, and upon which others have been led to rely. Sound ethics require that the apparent, in its effects and consequences, should be as if it were real, and the law properly so regards it. *Eaton et al. v. Aspinwall*, 19 N. Y. 119; *S. C.*, 6 Duer (N. Y.), 176; *Cooper v. Shaver et al.*, 41 Barb. (N. Y.) 151; *Camp v. Byrne*, 41 Mo. 525; *Danbury & N. Railroad Co. v. Wilson*, 22 Conn. 435; *Ellis v. Schmack & Thomas*, 5 Bing. 521; *McFarlan v. The Triton Ins. Co.*, 4 Denio (N. Y.), 392; *Rector & Co. v. Lovett*, 1 Hall (N. Y.), 191; *Topping v. Bickford*, 4 Allen (Mass.), 121; *Dooley v. Wolcott*, *id.* 407; *Eppes v. Railroad Company*, 35 Ala. 33; *Hamtramack v. Bank of Edwardsville*, 2 Mo. 169; *Jones v. Cincinnati*

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*Type Foundry*, 14 Ind. 89; *Worcester Med. Ins. v. Harding*, 11 Cush. (Mass.) 285; *Hughes v. Bank of Somerset*, 5 Litt. (Ky.) 47; *Tar River Nav. Co. v. Neal*, 3 Hawks (N. C.), 520.

*Demurrer sustained.*

At a subsequent day of the term, pursuant to leave granted, three pleas were filed. The question arising upon demurrers to the special pleas were argued by the same counsel.

Mr. Justice SWAYNE delivered the opinion of the court.

Since the opinion of the court was delivered in this case, the defendant obtained leave to plead further, and has filed three pleas. They are:

First. *Nil debet*, upon which the plaintiff has taken issue.

Second. That the Comptroller of the Currency has "determined and decided to exact from the defendant, and from a number of stockholders of said National banking association less than the whole, such sums of money as would suffice to pay all the debts and liabilities of the said National banking association, with the intent and purpose to compel this defendant and others of said shareholders who may be solvent to contribute the entire sum necessary to pay the debts and liabilities of the said National banking association, without any contribution from those who are insolvent."

It is a sufficient objection to this plea that the Comptroller has ordered that each stockholder shall pay to the receiver the par of his stock. This order cannot be controverted in a suit against the stockholder. It is conclusive upon him, and makes it his duty to pay. *Kennedy v. Gibson and others*, 8 Wall. 498. What may be done or intended with respect to other stockholders is immaterial in his case.

The plea is, also, manifestly bad for vagueness and uncertainty.

Third. That the Comptroller has decided to pay a large amount of claims against the bank for which the bank is not responsible, and that, aside from these claims, there are means enough already in his hands to meet the liabilities of the bank.

The same objection lies to this plea as to the preceding one, and the same authority applies. If the receiver intends to violate, or shall violate, his duty in discharging the trust confided to him, the remedy must be sought in another proceeding. It cannot avail the defendant in this action.

Both demurrers are sustained.

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Adams v. Mayor, etc., of Nashville.

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The parties have filed a written stipulation submitting the issues raised upon the first plea to the court and waiving the intervention of a jury.

With respect to this issue, we find the proofs in the record amply sufficient to sustain the plaintiff's case.

Judgment must, therefore, be rendered against the defendant for the par of his stock, with interest, as claimed in the declaration, and costs, and it is

*So ordered.*

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ADAMS V. MAYOR, ETC., OF NASHVILLE.\*

(16 Alb. Law Jour. 416.)

*State taxation of National banks.*

The act of Congress of June, 1864, in relation to the taxation of National banks, does not curtail State power as to the subject of taxation, or cut off the right to exempt certain kinds of property if a legislature chooses to do so. Its only object is to prevent unfriendly discrimination against National banks.

**I**N error to the Supreme Court of the State of Tennessee. Sufficient facts appear in the opinion.

*Ed. Baxter*, for plaintiff in error.

*J. E. Basley* and *John Lellyett*, *contra*.

Mr. Justice HUNT delivered the opinion of the court.

The plaintiffs in error, who are stockholders in the Fourth National Bank of Nashville, Tennessee, filed their bill in the chancery court of that State against the defendant in error, a municipal corporation, to enjoin the collection of a tax imposed upon their shares of stock by said corporation, and to have the tax declared illegal and void.

The bill was demurred to. The chancellor sustained the demurrer and dismissed the bill. Upon appeal to the Supreme Court of Tennessee, the highest court of law or equity in the State, the

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\* This case is not yet reported in the U. S. Supreme Court Reports.

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Adams v. Mayor, etc., of Nashville.

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decree of the chancellor was affirmed, and thereupon the case was brought to this court by writ of error.

It is contended that the statute of the United States which authorizes the taxation by State authority of the shares of stock in a National bank, but provides that such taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individuals, has been violated in the case of the present plaintiff. 13 Stat. at Large, 102. The first cause of complaint arises out of the act of the legislature of the State of Tennessee of March 1, 1869. The act, it is said, provides that no tax shall be assessed upon the capital of any bank or joint-stock company organized under the laws of that State. This, it is insisted, is an exemption from taxation of property in the hands of individual citizens, and operates to produce a greater rate of taxation on the plaintiffs' shares in the Fourth National Bank of Nashville than is assessed on other moneyed capital in the hands of individuals, to wit, on such banking capital, and hence, that such taxation is illegal.

The statute enacts that no tax shall be assessed upon the capital of a State bank, but proceeds in the same section, to say that its shares shall be included in the valuation of the personal property of the owner, for the purpose of assessment for State, county and municipal taxation, at the same rate that is assessed upon other moneyed capital, and that, in addition thereto, the real estate owned by the bank shall be subject to the same taxation as other real estate.

This objection, in its general character, may be considered in connection with the second objection. The answer to both of them is found in the principle thus laid down in *People v. Commissioners*: "That the rate of taxation upon the shares should be the same or not greater than upon the moneyed capital of the individual citizen which is liable to taxation; that is, no greater in proportion or percentage of tax in the valuation of shares should be levied than upon other moneyed taxable capital in the hands of the citizens." 4 Wall. 256. See, also, *Hepburn v. School Directors*, 23 id. 480 (*ante*, p. 113).

Second. By an ordinance of the defendants' corporation, passed on the 18th of April, 1870, it is provided that certain interest-paying bonds issued by the said corporation shall be exempt from taxation by said corporation. It is said that there are many such bonds in existence in the hands of individuals; that by such exemption

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Adams v. Mayor, etc., of Nashville.

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the complainants' shares are taxed at a greater rate than is assessed upon such bonds, and that, therefore, the taxation complained of is in violation of the act of Congress forbidding the taxation of National shares at a greater rate than is assessed upon other moneyed capital in the hands of individuals.

There are several answers to this objection:

1st. It is not alleged in the bill that the bonds therein referred to are in fact exempted from taxation for municipal purposes. After reciting the issue and proposed exemption, the bill says that said property is "thus exempted from all municipal taxes;" that is, that, as a matter of law, it follows from the facts before stated that it is thus exempt.

This is not sufficient, especially when it is alleged in the brief opposed that the fact is otherwise.

2d. By the statutes of the State of Tennessee, passed subsequently to the issue of the bonds, all personal property, of every kind and nature, is required to be listed and assessed for taxation.

The Supreme Court of Tennessee hold, in the case before us, that this statute repeals and overrides the ordinance of exemption and brings these bonds within the scope of general taxation. This is a decision of a State tribunal upon the construction of its own statutes, which we are bound to respect.

3d. Considering the objection on its merits and in connection with the objection first described, the case is met by *Hepburn v. School Directors*, 23 Wall. 480.

By a statute of Pennsylvania, it was enacted that "all mortgages, judgments, recognizances and money owing upon articles of agreement for the sale of real estate shall be exempt from taxation, except for State purposes." There, as here, it was objected that this exemption by relieving certain specified property from taxation brought the case within the prohibition of the act of Congress, and thus vitiated the tax sought to be enforced. This court held otherwise.

The act of Congress was not intended to curtail the State power on the subject of taxation. It simply required that capital invested in National banks should not be taxed at a greater rate than like property similarly invested. It was not intended to cut off the power to exempt particular kinds of property if the legislature chose to do so. Homesteads, to a specified value, a certain amount of household furniture (the six plates, six knives and forks, six

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Union Gold Hill Mining Co. v. Rocky Mountain National Bank.

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tea-cups and saucers, of the old statutes), the property of clergymen to some extent, school-houses, academies and libraries, are generally exempt from taxation. The discretionary power of the legislature of the States over all these subjects remains as it was before the act of Congress, of June, 1864. The plain intention of that statute was to protect the corporations formed under its authority from an unfriendly discrimination against them of the power of State taxation. That particular persons or particular articles are relieved from taxation is not a matter to which either class can object.

• The third objection is equally untenable. The statute referred to does not purport to relieve any property from taxation. It provides a mode for ascertaining the average capital of the merchant, and for giving a license to carry on the business of a merchant. He is required to pay an *ad valorem* tax on all his capital and a license tax in addition.

The observations already made are pertinent under this head.

*Judgment affirmed.*

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UNION GOLD HILL MINING CO. v. ROCKY MOUNTAIN NATIONAL BANK.\*

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*Loans in excess of one-tenth of capital.*

Loans to any person or company in excess of one-tenth part of the capital stock of a National bank are not void, and in an action to recover such loans the defendant cannot interpose the defense that they were in violation of the National Banking Act.

**E**RROR to the Supreme Court of the Territory of Colorado. Action to recover \$20,000 loaned and advanced by the defendant in error — the Rocky Mountain National Bank — to the Union Gold Hill Mining Co. Plea, the general issue, and that the capital of the bank was only \$50,000, and that under the National Banking Act all loans to an individual or company in excess of one-tenth of said capital were void. There was a demurrer to the special plea, which was sustained, and a verdict rendered for the

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\*This case is not yet reported in the U. S. Supreme Court Reports.

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Union Gold Hill Mining Co. v. Rocky Mountain National Bank.

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plaintiff. The defendant brought error. The other material facts are stated in the opinion.

*Wheeler H. Peckham*, for plaintiff in error.

*I. M. Woolworth*.

Mr. Justice HUNT delivered the opinion of the court.

The Rocky Mountain Bank brought its action to recover a balance of over-draft, due upon the account kept in the name of the Union Gold Mining Company at that bank. The balance of over-draft exceeding \$20,000 was created by drafts or checks drawn by one Sabin, acting in the name of the mining company and claiming to be its authorized agent, and he also made deposits from time to time to the credit of the mining company. The jury rendered a verdict in favor of the bank for the amount of the over-draft with interest (\$30,358.32), and from the judgment entered upon that verdict the present writ of error is brought.

The defendant presented formal requests to charge to the number of forty, one of which was subdivided into three parts. It asked for a new trial upon ten grounds severally set forth, and the assignment of errors below discloses one hundred and thirty-three allegations of error.

There was but a single question in the case, to-wit: were the acts of Sabin the acts of the gold-mining company, either by original authority or by ratification; as it was finally put to the jury, was there a ratification of his acts by the company? We shall consider the objections most seriously urged and having the greater plausibility.

The first objection to the recovery arises from the amount of the debt. The plaintiff is a National bank organized under the act of Congress of 1864 (13 Stat. at Large, p. 108). By the 29th section of that act, it is provided as follows: "The total liabilities to any association of any person, company, corporation, or firm, for money borrowed, including in the liability of a firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in. Rev. Stat., § 5200.

After obtaining and holding to its own use the money of the bank, can the mining company be allowed to interpose the plea that the bank had no right to loan the money? In *Harris v. Runnels*,



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Union Gold Hill Mining Co. v. Rocky Mountain National Bank.

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12 How. 79, the court say "that where the defendant sued upon a note sets up the illegality of the consideration, the whole statute must be examined to discover whether the legislature intended to prevent courts of justice from enforcing contracts in relation to the act prohibited. When a statute prohibits an act or annexes a penalty for its commission, it does not follow that the unlawfulness of the act was meant to avoid a contract made in contravention of it. When a statute provided that slaves should not be brought into this State without a previous certificate signed by two freeholders, and the slaves were brought in without such certificate and sold, the contract is not void, but the purchaser must pay his note given for the purchase-money." Justice WAYNE says that the rule is allowed not for the benefit of either party to the illegal contract, but altogether upon grounds of public policy.

In *O'Hare v. The Second National Bank of Titusville*, 77 Penn. St. 96,\* the question was made upon the statute we are considering, and it was objected that the bank could not recover the amount of the loans in excess of the proportion specified. The court held that the section of the statute referred to was intended as a rule for the government of the bank, and that the loan was not void. See, also, *Pangburn v. Westlake*, 36 Iowa, 546; *Vining v. Bricker*, 14 Ohio St. 331.

We do not think it required by public policy or that Congress intended that an excess of loans beyond the proportion specified, should enable the borrower to avoid the payment of the money actually received by him. This would be to injure the interests of creditors, stockholders, and all who have an interest in the safety and prosperity of the bank.

We are of the opinion that this objection is not well taken.

[The remainder of the opinion was not important.]

*Judgment affirmed.*

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\*See *post*.

. UNITED STATES, plaintiff in error, v. MANN.\*

(17 Alb. Law Jour. 85.)

*Right of revenue collector to examine paid bank checks.*

Under section 3177 of the United States Revised Statutes, authority is given to any collector, deputy collector, or inspector of internal revenue, to enter, in the day-time, any building or place within his district, where any articles or objects subject to such taxation are made, produced, or kept, so far as it may be necessary for the purpose of examining such objects or articles, and the provision is that any owner of such building or place, or any person having the agency or superintendence of the same, who refuses to admit such officer or suffer him to examine such articles or objects, shall for every such refusal forfeit five hundred dollars. *Held*, that under this provision, paid bank checks, which were duly and sufficiently stamped at the time they were made, signed and issued, are not articles or objects subject to taxation, and an officer of a bank where such checks are may lawfully refuse to suffer the collector to examine such checks.†

**E**RROR to the Circuit Court of the United States for the District of Minnesota. The facts fully appear in the opinion.

Mr. Justice CLIFFORD delivered the opinion of the court.

Authority is given to any collector, deputy collector, or inspector of internal revenue to enter, in the day-time, any building or place within his district, where any articles or objects subject to such taxation are made, produced, or kept, so far as it may be necessary for the purpose of examining such objects or articles, and the provision is that any owner of such building or place, or any person having the agency or superintendence of the same, who refuses to admit such officer or suffer him to examine such articles or objects, shall for every such refusal forfeit five hundred dollars. Rev. Stat., § 3177.

Founded upon that provision in the act of Congress the complaint filed in the Circuit Court alleges and charges that the defendant, having at the time mentioned the care and superintendence of the described bank and its place of business, in which certain paid bank checks were then and there kept, refused then and there to suffer the collector of the district, who then and there entered the bank for the purpose, to examine the said paid bank checks so kept then and there in said place of business, though thereto requested by the

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\* This case is not yet reported in the U. S. Supreme Court Reports.

† See *United States v. Rhawn*, *post*.

collector, which said refusal was then and there contrary to the form of the statute in such case made and provided.

Service was made and the defendant appeared and demurred to the complaint. Hearing was had and the court sustained the demurrer, the reasons for the conclusion not being exhibited in the transcript, but the record contains a statement to the effect that the plaintiffs standing on their complaint, the court rendered judgment for the defendant. Error was assigned by the plaintiffs, and they sued out the present writ of error. It is now contended by the United States that the judgment was for the wrong party, that it should have been rendered for the plaintiffs and not for the defendant, which is the only error assigned for the consideration of this court.

Bank checks, drafts, or notes for the payment of money, drawn upon any bank, broker, or trust company, at sight or on demand, are subject to a tax of two cents, to be paid by the person who makes, signs, or issues the same, or for whose use or benefit the same are made, signed or issued. Rev. Stat., § 3418; 18 Stat. at Large, 310. Exceptions exist to that requirement in behalf of Federal and State officers and in behalf of county, town, and other municipal corporations, when in the strict exercise of functions belonging exclusively to their ordinary governmental or municipal capacity. *Id.*, § 3420.

Cases arise where such an instrument is issued, without being duly stamped, and in such a case the provision is that neither the instrument nor any copy thereof shall be admitted or used in evidence in any court until a legal stamp denoting the amount of the tax is affixed thereto, as prescribed by law. Instruments of the kind are required to be stamped at the time of their issue, and the provision is that unless a stamp or stamps of the proper amount shall be affixed to the same and canceled, it shall not be lawful to record the instrument, and that the record, if so made, shall be utterly void. Provision is also made that parties violating those regulations by making, signing, or issuing any such instrument, a document, or paper, without being duly stamped, shall for every such offense forfeit the sum of fifty dollars, and that the unstamped instrument shall be deemed invalid and of no effect. *Id.*, § 3422.

Such officer may enter in the day-time any building or place within his district where any articles or objects subject to taxation are made, produced, or kept, so far as it may be necessary for the

purpose of examining said articles or objects. Unless articles or objects of taxation are made, produced, or kept in any building belonging to another, the collector derives no authority under that act to enter the building at all, and even then his right to enter the same is strictly limited by the words so far as it may be necessary for the purpose of examining such articles or objects.

Where articles or objects subject to taxation are made, produced, or kept in any building, by whomsoever owned, the provision is that the collector or other officer named may enter the same, so far as it may be necessary for the purpose of examining said articles or objects, but the act of Congress gives the officer no authority whatever to enter the building of another for any other purpose than that which the act specifically describes.

Strictly limited as the right conferred is, it is a privilege easily defined, and it is equally clear that the prohibition addressed to the owner or person in charge of the place of business is explicitly confined to the refusal to suffer the officer to enter the building where the articles or objects subject to taxation are made, produced, or kept, for the special purpose particularly set forth in the section. Owners of such a building or persons having the agency or superintendence of the same are forbidden to refuse to admit the collector, deputy collector, or inspector to enter such building for the described special purpose, and the provision is that if they do so refuse and do not suffer the officer to examine such articles or objects, they shall for every such refusal forfeit five hundred dollars.

Persons other than the owner of the building or place of business cannot be held liable to the penalty prescribed in the section unless it be alleged and proved that he or they had at the time the agency or superintendence of the same, and that it was a building or place where articles or objects subject to taxation were made, produced, or kept, and that the person or persons accused of having violated the prohibition of the section, then and there refused to allow the officer to enter the building or place of business for the described purpose, or to suffer him to examine the articles or objects subject to taxation then and there kept in said building or place of business.

Information for offenses or penalties created and defined by statute, like indictments, must follow the words of the statute, and where there is no substantial departure from that requirement, the

information, like the indictment, is in general sufficient, except in cases where the statute is illiptical, or where, by necessary implication, other constituents are component parts of the offense. Offenses created by statute as well as offenses at common law consist, with rare exceptions, of more than one ingredient, and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly expressed in the indictment or information, or the pleading will be held bad on demurrer. *United States v. Cook*, 17 Wall. 67; 1 Bishop's Cr. Pro. (2d ed.), § 81; Arch. Cr. Pl. & Ev. (18th ed.) 54.

Orders for the payment of money, including checks and drafts drawn upon any bank, banker or trust company, are subject to a tax of two cents, and it is understood to be the opinion of the department that the exaction specified is a tax upon the instrument, to be paid by the person who makes, signs, or issues the same, or the person for whose use or benefit the order or check was made, signed or issued. Rev. Stat., § 3418; 18 Stat. at Large, 310.

Suppose that is so, then it may perhaps be suggested that a bank check, though paid, if it was made, signed, and issued without being duly stamped with a stamp denoting the amount of the tax, is still an article or object subject to taxation within the meaning of the provision under consideration, unless it can be held that the tax is merged in the penalty prescribed for the violation of the requirement that the instrument shall be stamped at the time it is made, stamped and issued. *Id.*, § 3421.

Such a question may arise in a subsequent case, but it is wholly unnecessary to discuss it in the case before the court, as it is not alleged in the information that the paid bank checks therein described were not duly stamped at the time the same were made, signed and issued, as required by the act of Congress. Instead of that the charge in the information is to the effect that the paid bank checks were then and there kept in the bank or place of business then and there under the charge and superintendence of the defendant; that the collector of the district then and there entered the said bank or place of business for the purpose of examining the said paid bank checks, and that he, the collector, then and there requested the defendant to suffer him to examine the said paid bank checks so kept by the said bank then and there in their said place of business, and that the defendant then and there refused the said request of the said collector. Matters not alleged in the

information cannot be regarded as confessed by the defendant, as the demurrer only admits what is well pleaded.

Certain bank checks which had theretofore been drawn upon and paid by the bank, it is alleged in the information, were then and there kept in the rooms and vaults of the bank, and it is proper to say that the said checks are described in the preliminary part of the information as "articles subject to tax," but it is nowhere alleged in the information that the said paid bank checks were not duly stamped with stamps denoting the tax to which the same were subject at the time the checks were made, signed and issued.

Ingredients or elements not set forth in the information or other criminal accusation cannot be incorporated into the charge against the defendant after he is served with process, and it is equally clear that paid bank checks, which were duly and sufficiently stamped at the time they were made, signed and issued, are not articles or objects subject to taxation within the meaning of the act of Congress on which the information in this case is founded, and if so, then it follows as a necessary conclusion that the defendant might lawfully refuse to suffer the collector to examine the paid bank checks described in the information.

Penal offenses created by statute, whether to be prosecuted by indictment or information, must be accurately and clearly described in the pleadings for the recovery of the penalty, and if the offense cannot be so described without expanding the allegations beyond the mere words of the statute, then it is clear that the allegations of the accusation must be expanded to that extent, as it is universally true that no pleading in such a case can be sufficient which does not accurately and clearly allege all the ingredients of which the charge is composed, so as to bring the accused within the true intent and meaning of the statute defining the accusation.

"In general," says MARSHALL, Ch. J., "it is sufficient in a libel of information to charge the offense in the very words which direct the forfeiture, but the proposition, we think, is not universally true. If the words which describe the subject-matter of the prohibition are general, including a whole class, \* \* \* we think the charge in the libel ought to conform to the true sense and meaning of the words as used by the legislature." *The Mary Ann*, 8 Wheat. 389; *The Hoppet*, 7 Cr. 393; 2 Pars. on Ship. & Adm. 386.

Examples of the kind where it has been held that it is not suffi-

cient to follow the words of the statute are quite numerous, and they show that many of the exceptions are as extensively recognized and as firmly settled as any other rule of pleading in such cases. Views of a corresponding character are expressed by this court in another case, where the opinion was delivered by Mr. Justice STORY: Having stated the rule that it is in general sufficient to allege the offense in the very terms of the statute, he proceeds to remark. We say in general, for there are doubtless cases where more particularity is required either from the obvious intention of the legislature or from the known principles of law, both of which exceptional requirements are applicable in this case.

Known principles of law require greater particularity to be observed in order that all the ingredients which constitute a violation of the statutory offense may be accurately and clearly alleged, and it is equally clear that the intention of Congress requires the same thing, as it is obvious that Congress never could have intended that paid bank checks, duly and sufficiently stamped at the time they were made, signed and issued, should be regarded as articles or objects subject to taxation within the meaning of the provision in the act of Congress under consideration. *The Caroline*, 7 Cr. 500; *The Anne*, id. 571; Conkl. Treat. (5th ed.) 546.

Authorities other than those already referred to are not necessary to show that an information to recover a penalty created by statute must state all the material facts and circumstances which constitute the offense, so as to bring the party impleaded precisely within the provision of the statute defining the offense; but should it be desired to consult other authorities, it will be found that the following fully support the propositions: 2 Colby's Cr. Law, 114; *People v. Wilbur*, 4 Park. C. C. 21; *Com. v. Cook*, 13 B. Monr 149; *Steel v. Smith*, 1 Barn. & Ald. 99; Conkl. Treat. (5th ed.) 548.

Viewed in the light of these suggestions it is clear that the right conferred upon the officer to enter the building or place of business of another in such a case is strictly limited to a building or place of business in which articles or objects subject to taxation are, at the time of the proposed entry and examination, made, produced, or kept, and that paid bank checks, unless it is alleged and proved that they were not duly and sufficiently stamped at the time they were made, signed and issued, are not articles or objects subject to taxation within the meaning of the act of Congress on which the information is founded. Nothing is admitted by the

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United States v. Mann.

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demurrer except what is well pleaded in the information, and inasmuch as the only charge of the information in that regard is that paid bank checks were then and there kept in the said building or place of business described, the court is of the opinion that the information does not set forth any legal offense against the defendant, as defined by the said act of Congress.

*Judgment affirmed.*



CASES DECIDED

IN THE

CIRCUIT AND DISTRICT COURTS

OF THE

UNITED STATES.

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MANUFACTURERS' NATIONAL BANK V. BAACK.

(2 Abb. U. S. 232 ; 8 Blatch. 147.)

*Action by National banks — Where may be brought.*

A National bank located in one State may bring an action in the Circuit Court of the United States sitting within another State against a citizen thereof.\* In such action it will be presumed, so far as the question of jurisdiction is concerned, that the stockholders of such bank are citizens of the State where the bank is located.

(Circuit Court, Second Circuit, Southern District of New York, January, 1871.)

**A**PPPLICATION for an injunction and receiver. The opinion states the case.

*Francis C. Barlow*, for the motion.

*C. A. Seward* and *P. C. Talman*, opposed.

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\* See *Main v. Second National Bank*, *post*. The act of Congress of March 3, 1875, confers upon the Circuit Courts jurisdiction of suits "in which there shall be a controversy between citizens of different States"—so that it is no longer essential that one of the parties to a suit in that court shall be a citizen of the State where the suit is brought. See *Osgood v. Chicago, etc., Railway Company*, 6 Biss. 330.

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Manufacturers' National Bank v. Baack.

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BLATCHFORD, J. The bill in this case describes the plaintiffs as "Manufacturers' National Bank of Chicago, Illinois, a banking corporation, incorporated and existing under and by virtue of an act of the Congress of the United States, entitled "An act to provide a National currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof, approved June 3, 1864, and having capacity to sue by the above title, and a citizen of the State of Illinois, and located and residing and doing business in the city of Chicago, in said State." It describes the defendants as citizens of the State of New York. The allegations of the bill as to the incorporation and location of the plaintiffs are admitted by stipulation. The plaintiffs move for an injunction, and the appointment of a receiver in the case; and the question arises whether, on the allegations of the bill thus admitted, with the fact that the allegation of the bill as to the citizenship of the defendants is not denied by the answers, this court has jurisdiction of the suit.

The eighth section of the act of June 3, 1864 (13 Stat. at Large, 101), under which the plaintiffs are incorporated, provides that every association formed pursuant to the provisions of the act shall be a body corporate, and may have a corporate seal, and shall have succession by the name designated in its organization certificate, and may, by such name, "sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons." The effect of this provision is not to give to the corporation the right to sue, or the capacity to be sued, in every court within the United States, whether State or Federal, or to give to every such court jurisdiction over every suit which may be brought in it, wherein the corporation is plaintiff or defendant. Its only proper effect is to provide that the corporation, when it has come or been brought as a suitor into a court which has jurisdiction of the suit, shall stand in court, in all respects, in the same position, as regards its own rights, or the rights of others against it, as to the subject-matter of the suit, in which a natural person who is a suitor in such court can stand. The question as to the proper court in which the suit is to be brought, in respect of jurisdiction, is left to be determined by other provisions of law. If a natural person had brought this suit in this court against the defendants, as citizens of New York, he would have been obliged to aver himself to be a citizen of some State other than New York, the bill being what

is known as a creditors' bill, founded on a judgment at law and praying for equitable relief. Therefore, so far as the provisions of section 8 of the act are concerned, the plaintiffs must show, by the averments of their bill, jurisdiction of this suit by this court by showing proper citizenship in the parties.

There is no other provision of the act which can be cited as giving to this court jurisdiction of this suit. Section 57, even if under the dictum of Mr. Justice SWAYNE, in *Kennedy v. Gibson*, 8 Wall. 498, 506, it be held to refer to suits by National banks as well as to suits against them, relates only to suits to be brought in courts of the United States held within the district in which the bank is established, and does not affect the question of the jurisdiction of this court in this suit. Such jurisdiction, in order to be sustained, must, therefore, appear, by the averment of the bill, to be brought within that provision of section 11 of the Judiciary Act of September 24, 1789 (1 Stat. at Large, 78), which gives to this court original cognizance of all suits of a civil nature in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars, and the suit is between a citizen of the State where the suit is brought and a citizen of another State.

The averment in the bill that the plaintiff corporation is a citizen of the State of Illinois is, in and of itself, not sufficient to show jurisdiction, as a corporation cannot be a citizen of a State, in the sense in which that word is used in the Constitution of the United States. *Lafayette Ins. Co. v. French*, 18 How. 404; *Covington Drawbridge Co. v. Shepherd*, 20 id. 227, 233, 234. The substance of the averments in the bill in regard to the status of the plaintiffs is, that they are a banking corporation, incorporated under the act of Congress named; that their members are authorized to sue by the title given to the corporation; that the corporation is located and does business at Chicago, in the State of Illinois; and that, therefore, the real plaintiffs, the members of the corporations, must be regarded, on such averments, as citizens of the State of Illinois.

The various decisions of the Supreme Court, in cases of suits in the Federal courts by and against corporations created by the laws of the States, where the jurisdiction depended on the citizenship of the parties to the suit, are reviewed in the opinion given by that court, in the case of *Ohio & Mississippi R. R. Co. v. Wheeler*, 1 Black, 286. The law is there stated to be settled, that where a

corporation is created by the laws of a State, the legal presumption is that its members are citizens of such State; that a suit by or against such corporation, in its corporate name, must be presumed to be a suit by or against citizens of the State which created the corporation; and that no averment or evidence to the contrary is admissible, for the purpose of withdrawing the suit from the jurisdiction of a court of the United States. In the case of *Cowles v. Mercer County*, 7 Wall. 118, 121, the rule is thus stated: "A corporation created by the laws of a State, and having its place of business within that State, must, for the purposes of suit, be regarded as a citizen, within the meaning of the Constitution giving jurisdiction founded upon citizenship." This rule, however, does not, *ex vi termini*, cover the case of a corporation created by act of Congress.

The argument urged against a jurisdiction in this case drawn from citizenship, is that, as the corporation is created by the United States, the only legal presumption that can be drawn is, that its members are citizens of the United States; and that there is no presumption that they are citizens of the State in which the corporation is located.

With a view to the consideration of the question raised, it will be necessary to examine the statutory provisions in respect to the location of banking associations. Section 6 of the act of 1864 provides that the organization certificate of every association for carrying on the business of banking, formed under the act (and which, by the execution of such certificate, becomes, under section 8, a body corporate), shall specify the place where the operations of discount and deposit of the association are to be carried on, designating the State, Territory, or district, and also the particular county and city, town, or village. Section 44 provides that any bank incorporated or organized under a law of a State may, by authority of such act of Congress, become a National association under the provisions of such act, by the name prescribed in an organization certificate, such as is required by such act, to be executed by a majority of its directors, the certificate declaring that the owners of two-thirds of the capital stock have authorized the directors to make such certificate, and "to change and convert the said bank or banking institution into a National association under this act," and that, on a compliance with certain provisions prescribed in that section, the association shall be held and regarded as an association

under the act. There is, therefore, no difference, in regard to its status, between an association formed under the act, and one converted into a National association under the act. In each case, it must be regarded as holding its corporate existence under and by virtue of the act.

What, then, are the consequences of the fixing of place provided for in section 6? Section 8 provides that the usual business of the association shall be transacted at an office or banking-house "located" at the place specified in its organization certificate. Section 9 provides that at least three-fourths of the directors shall have resided in the State in which the association is "located" one year next preceding their election as directors, and be residents of the same during their continuance in office. Sections 10, 15, 18 and 42 speak of the association as being "located" in a city, town, or county. Section 30 speaks of the laws of the State where the bank is "located." Section 34 speaks of the place where the association is "established." Section 41 speaks of taxes imposed "by or under State authority, at the place where such bank is located." The word "place," in this section 41, is declared by the act of February 10, 1868 (15 Stat. at Large, 34), to mean "the State within which the bank is located." This act of 1868 also provides that the legislature of each State may determine and direct the manner and place of taxing all the shares of the National banks "located" within said State, and that the shares of any National bank owned by non-residents of any State shall be taxed in the city or town where such bank is "located." Section 50 of the act of 1864 provides that an association may apply to the "nearest" circuit, or district, or territorial court of the United States, in certain cases, to enjoin the Comptroller of the Currency. Section 57 provides that suits, actions, and proceedings against any association under the act, may be had in any circuit, district, or territorial court of the United States held within the district in which the association may be "established," or in any State, county, or municipal court in the county or city in which the association is "located," having jurisdiction in similar cases, provided that all proceedings to enjoin the Comptroller under the act shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is "located."

Section 21 of the act of 1864, as amended by the act of March 3, 1865 (13 Stat. at Large, 498), provides, that of the three hundred

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millions of dollars of circulating notes authorized to be issued, one hundred and fifty millions of dollars shall be apportioned to associations in the States, in the District of Columbia, and in the Territories, according to representative population, and that the remainder shall be apportioned by the Secretary of the Treasury among associations formed in the several States, in the District of Columbia, and in the Territories, having due regard to the existing banking capital, resources, and business of such States, districts, and Territories. The act of July 12, 1870 (16 Stat. at Large, 251, § 1), provides that fifty-four millions of dollars, in notes for circulation, may be issued to National banking associations, in addition to the three hundred millions of dollars, and shall be furnished to banking associations organized or to be organized in those States and Territories having less than their proportion under the apportionment contemplated by the act of 1865, before referred to; and that a new apportionment of such increased circulation shall be made as soon as practicable, based upon the census of 1870.

Section 6 of the act of 1870 provides for "a more equitable distribution" of the National banking currency, by withdrawing circulating notes from banking associations organized in States having a circulation exceeding that provided for by the act of 1865, and issuing a like amount of notes to banking associations organized in States and Territories having less than their proportion, the intention being, as declared by the section, that "the circulation so withdrawn shall be distributed among the States and Territories having less than their proportion, so as to equalize the same." Section 7 of the act of 1870 provides that after January 12, 1871, any banking association "located" in any State having more than its proportion of circulation, may be removed to any State having less than its proportion of circulation, under such rules and regulations as the Comptroller of the Currency, with the approval of the Secretary of the Treasury, may require.

It is quite apparent, from all these statutory provisions, that Congress regards a National banking association as being "located" at the place specified in its organization certificate. If such place is a place in a State, the association is located in that State. It is, indeed, located but at one place in the State, but, when it is so located, it is regarded as located in the State. The requirement that at least three-fourths of the directors of the association shall be residents, during their continuance in office, in

the State in which the association is located, especially indicates an intention on the part of Congress to regard the association as belonging to such State. Three-fourths of the legal representatives of the unknown associates forming the corporation, with which representatives any person dealing with the corporation must deal, are required to reside in the State where the corporation is "located." The reasons, so forcibly stated in the opinion of the court in the case of *Marshall v. Baltimore & Ohio R. R. Co.*, 16 How. 314, 326-329, why a grant of power by a competent authority, to certain associated persons to act by representatives, and to sue and be sued in a collective or corporate name, should not be allowed to prejudice any right of those dealing with such persons, apply as fully to the case of a bank created by Federal authority, and located in a particular State, as to one created by State authority and located in the State which created it. The view taken by the court in that case was, that the persons using the corporate name of a corporation created by a State may be justly presumed to be resident in the State which is the necessary habitat of the corporation; that the presumption arising from the habitat of a corporation created by a State in the place of its creation is conclusive as to the residence or citizenship of those who use the corporate name, and exercise the faculties conferred by it; that the right of choosing an impartial tribunal is a privilege of no small practical importance, and more especially in cases where a distant plaintiff has to contend with the power and influence of great numbers, and the combined wealth wielded by corporations in almost every State, and that it is of importance, also, to corporations themselves, that they should enjoy the same privileges in other States, where local prejudices or jealousy might injuriously affect them. The principle has been settled ever since the case of *Louisville R. R. Co. v. Letson*, 2 How. 497, that where a corporation is created by the laws of a State, the legal presumption is that its members are citizens of such State. Where a corporation is created by competent authority — authority as competent within a given State, to create such corporation, and to locate it in such State, as is the State itself — and a location and habitat within such State, and not elsewhere, is given by the creating authority to such corporation, there is no reason why the legal presumption should not be that the members of such corporation are citizens of such State, within the meaning of section II, of article III of the Constitution, and of

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section 11 of the Judiciary Act of 1789. The presumption, in the case of a corporation created by a State, is only arrived at by presuming the members of the corporation to be citizens of the United States, and to be residents in the State, and, therefore, under the decision in *Gassies v. Ballou*, 6 Pet. 761, citizens of the State. The members of a corporation created by the United States, and located in a particular State, in the manner and to the extent in which National banking associations are located in particular States, may as properly be presumed to be citizens of the United States and residents in the State where the corporation is located, so as thereby to be citizens of such State, as the members of a corporation created by a State may be presumed to be citizens of the United States, and residents in the State creating it and in which it is located, and, therefore, citizens of such State.

But it is urged that the legislation of Congress shows an intention not to confer upon National banking associations the right to sue in the Federal courts. The first National banking law was passed February 25, 1863 (12 Stat. at Large, 665), and was repealed by section 62 of the act of June 3, 1864. Section 59 of the act of 1863, provided that "suits, actions, and proceedings by and against any association under this act may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established." The corresponding section (57) of the act of 1864, provides, that "suits, actions, and proceedings against any association under this act may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases." It is urged that this legislation indicates an intention that National banking associations shall not come into the Federal courts as plaintiffs, although they may be brought into those courts as defendants. But, independently of the view taken of section 57 of the act of 1864, in the opinion given by Mr. Justice SWAYNE in the case of *Kennedy v. Gibson* (before cited), it may well be said, that the object of such section is to enable a suit to be brought against a bank in any Federal court held in the district where the bank is established, without reference to the citizenship of the plaintiff in the suit. Under the decision in the case of *Osborn v. Bank of the United States*, 9 Wheat. 738,



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such suit is a case arising under a law of the United States, within the meaning of the Constitution, the bank being incorporated by a law of the United States; and it is competent for Congress to confer jurisdiction over it on the Federal courts. But the jurisdiction is expressly confined, by section 57, to suits brought in a Federal court held in the district where the association is established. Under it, however, these plaintiffs, a National bank, could bring a suit in this court against a National bank established in this district. The section embraces any plaintiff who has capacity to sue at all in any court. If these plaintiffs can sue another National bank in this court, it is difficult to see why they should not be allowed to sue in this court defendants who are citizens of New York. I can perceive no evidence, in the legislation referred to, that Congress intended that this court should not assume the jurisdiction invoked in this suit. So, too, the provision in section 2 of the act of July 27, 1868 (15 Stat. at Large, 227), withholding from banking corporations organized under a law of the United States, the privilege conferred by that act on other corporations organized under a law of the United States, of removing into a Federal court, certain suits brought against it, cannot be regarded as affecting the question of original jurisdiction involved in this case.

I am, therefore, satisfied that the averments of the bill are sufficient to show jurisdiction, and that this court has jurisdiction of this suit.

On the merits, the plaintiffs are entitled to the receivership and the injunction asked for in their notice of motions, so far as concerns the property specified in the first and second clauses of such notice; but, inasmuch as such property exceeds the amount of the plaintiffs' claim, the receiverships and injunction will be discharged on furnishing to the plaintiffs satisfactory security for the payment of their claim, if they shall recover in the suit.

An order will be settled on notice, embodying proper provisions.

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SHOEMAKER V. THE NATIONAL MECHANICS' BANK.

(2 Abbott, U. S., 416.)

*Enjoining misapplication of funds by officers of a National bank—Loans in excess of one-tenth of capital—Loans on stock as collateral security.*

The Circuit Court has jurisdiction, at the suit of a stockholder, to enjoin the officers of a National bank from any misapplication of its funds which might

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result from any act not warranted by its charter, or which would amount to a breach of trust.

A loan made to an individual or company by a National bank is not void because it is in excess of one-tenth of its capital stock paid in; and the money loaned may be recovered.\*

A National bank may lend money upon the personal obligation of the borrower secured by a pledge of stock of a corporation as collateral security.

(Circuit Court, Fourth Circuit, District of Maryland, March, 1869.)

## A PPLICATION for an injunction.

GILES, J. This bill is not filed to have the charter of defendant, as a National bank, declared null and void for the causes mentioned in section 53 of the act to provide a National currency, etc., passed June 3, 1864. This would not be the appropriate proceeding for such a purpose. That could only be accomplished by a suit instituted by the Comptroller of the Currency. But this is a bill filed by one of the stockholders in the National Mechanics' Bank of this city, to restrain the president and directors of the said bank from pursuing a course which, he alleges, is in violation of the requirements of their charter under the said act, and by which they are wasting the assets of the said bank, to the loss and injury of the complainant and its other stockholders.

Such being the object of the bill, if its allegations were admitted by the answer, or proved on final hearing to the satisfaction of the court, it would be its duty to restrain the officers of the said bank from any further misapplication of its funds which might result from any act not warranted by its charter, or which would amount to a breach of trust.

This is clear from the decision of the Supreme Court in the case of *Dodge v. Woolsey*, 18 How. 341. In that case the court says: "It is now no longer doubted, either in England or the United States, that the courts of equity in both have jurisdiction over corporations, at the instance of one or more of their members, to apply preventive remedies by injunction to restrain those who administer them from doing acts which would amount to a violation of charter, or to prevent any misapplication of their capitals

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\* See *Union Gold Hill Mining Co. v. Rocky Mountain National Bank*, ante, p. 151.

or profits which might result in lessening the dividends of stockholders, or the value of their shares, as either may be protected by the franchise of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust."

The motion for this injunction has been heard on bill and answer; and the principle is now almost universally recognized, that, where the answer denies all the circumstances upon which the equity of the bill is founded, the court will refuse the writ of injunction.

It becomes necessary, therefore, to carefully examine the bill and answer; the bill, that we may learn what are the facts which it sets forth, and on which it claims the equitable interference of the court, and the answer, that we may see if these facts are admitted or denied. Now there are many things stated in the bill, and replied to in the answer, with which we have nothing to do, on this motion. Whether the loan to Bayne, by the defendant, was made under such circumstances as will render the officers who made it responsible to the stockholders for any loss the bank may incur therefrom, can only be answered when this case comes before the court on final hearing. And it may be doubtful whether such question could even be decided on the pleadings in this case; it would seem to require a bill to be filed against the officers who made the loan individually. This is a bill against the bank in its corporate capacity. The allegations on which the preliminary injunction is asked, are the following: "That in violation of said express prohibition, and in violation of the trust as aforesaid confided to its officers, the said bank and its officers lent to Bayne and Bayne & Co., of the funds or capital of the said bank, from time to time, divers sums of money, in the whole largely exceeding one-tenth of the capital stock of said bank actually paid in, and that for many months the amount of money so loaned exceeded three hundred thousand dollars." And it is further alleged that said loans were made upon collateral security of shares of stock, etc., some of which were spurious, and that among these were twelve hundred and fifty shares, purporting to be the stock of the Washington, Georgetown, and Alexandria Railroad Company, a corporation which the bill charged never had any legal existence, etc. And that said bank is joining in the prosecution of or has been made party to certain suits, touching or concerning the interests of said railroad company.

It also charges that the said defendant, by its officers and agents, has offered to pay into the Circuit Court of the United States for the Eastern District of Virginia, the sum of twenty thousand dollars of the funds of said bank, in a cause therein depending, in which the said bank has no interest whatever, and to which it is not a party, and did actually pay in said cause two hundred dollars fees to commissioners, and did actually pay one hundred dollars to the trustees of Bayne & Co., upon some illegal and unauthorized agreement as to said securities taken by them from Bayne, and that they are negotiating for and offering to expend the money and funds of said bank in and about the repairs and reconstruction of the bridge of the said railroad company across the Potomac river, in which said bank has no sort of interest, and cannot legally have any. Said bridge, it is estimated, will cost over one hundred thousand dollars to repair it. And it concludes with a prayer that the said bank, its officers, agents, and attorneys, may be restrained from farther prosecuting or defending any one or more of said suits at the cost or charge, or in the name of said bank.

The answer admits that Bayne & Co. did pledge with its cashier, early in the month of February, 1866, as collateral security for its money loaned and advanced to the said firm, one thousand two hundred and fifty shares of the capital stock of said railroad company, of the par value of one hundred dollars each, and that the trustees of Bayne & Co. did subsequently, for one hundred dollars, assign all the equity of redemption of said stock to the cashier of this defendant.

It also admits that as a holder of stock of the said railroad company, it did agree with certain stockholders of said company to advance a portion of the sum of twenty thousand dollars, which was offered to be paid into the Circuit Court of the United States for the Eastern District of Virginia, in a cause in which the said railroad company and others were defendants, and Adams Express Company was complainant, to abide the decision of said cause, with the purpose of preventing the said railroad from passing into the hands of a receiver, to be appointed by said court, but said offer was refused by said court, and no money was paid on account thereof, and that this defendant was to have been adequately secured if said money had been actually advanced, and that it did advance about forty dollars, part of defendant's commissioner's

fees, in said cause. And this defendant denies that it is negotiating or offering to expend its money or funds in the repair and reconstruction of the railroad bridge across the Potomac. It also denies that it, or any of its officers, at the time said stock was issued in the name of its cashier, or previous thereto, had any knowledge or good reason to believe that the said railroad company had no legal existence, or that the certificates were fraudulently issued, but that as late as May, 1866, the stock of the said railroad company was held and esteemed as valuable stock, at par or over par, and that as late as the middle of May, 1866, large loans were effected upon the pledge of its certificates of stock at or about par.

Now, the only fact admitted in the answer, pertinent to the present inquiry, is that the defendant did receive from Bayne & Co. a pledge of the railroad stock as collateral security for loans made to said firm, and that said bank is now, in company with other stockholders of said railroad, engaged in suits, upon whose final decision depends the very existence of said road and the value of its stock. Will these facts warrant the granting of a preliminary injunction? Now the granting or refusing of an injunction is a matter resting in the sound discretion of a court of equity. It is one of the highest powers confided to a court of equity, and its exercise ought, therefore, to be guarded with extreme caution, and the remedy applied only in very clear cases.

As to the first charge in this bill against the defendant, in reference to the amount loaned to Bayne & Co., in violation of section 29 of the act of Congress passed June 3, 1864 (under which act the defendant became a National bank), I would only say that the loan made under such circumstances is not void—it can be enforced as any other loan made by the bank. This I apprehend is clear, from the fact that section 29 provides no penalty for its violation, and section 53 of the same act, for all violations of the provisions of the said act, provides two penalties: first, a forfeiture of the privileges and franchises of the said bank, derived from the said act, to be adjudged in a suit brought for that purpose in the Federal court; and second, a personal liability by every officer of a bank who participated in or assented to such violation, for all damages which the bank may sustain in consequence thereof.

Indeed, this clause was not pressed in the very able argument of the learned counsel who closed on behalf of complainant. The point so forcibly made by him was that the defendant was prohib-

ited by its charter from making this loan on a pledge of stock, and if so, no title to this stock passed from Bayne & Co. to the defendant. Clearly, if the defendant's title to this stock depended on a purchase as an investment by it, such purchase would be beyond its corporate powers, and void. The learned counsel, however, contended that by the true construction of section 8, this loan was not embraced among the enumerated powers of the bank,—“that no loans are valid except those made on personal security.” The language of that section is, “and exercise under this act all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, by receiving deposits, by buying and selling exchange, coin, and bullion, by loaning money on personal security, by obtaining, issuing and circulating notes, according to the provisions of this act.

I understand that the language I have quoted contains five distinct grants of power, and that no one grant is a limitation on any other. By the first the bank is authorized to discount promissory notes, drafts, bills of exchange, and other evidences of debt; second, to receive deposits; third, to buy and sell exchange, coin, and bullion; fourth, to loan money on personal security (I understand by this, on any personal security that is mentioned in the first grant); fifth, to obtain, issue, and circulate the National currency. If I am right in this construction, then the loan to Bayne & Co. was authorized by the said section, as the charge in the bill is that the loans to Bayne & Co. were made upon paper evidences of debt; upon bonds, notes, checks, etc.; and upon collateral security of stocks, etc.; and the answer states that the stock in said railroad was pledged with its cashier as collateral security for its money loaned. If collateral security, then collateral to personal responsibility of Bayne & Co., on the notes, checks, and bills of exchange, cashed for said firm by this defendant; for, collateral security, in bank phraseology, means some security additional to the personal obligation of the borrower. But admit that this construction is doubtful, it is not so doubtful as that construction which would limit the banks to the power of loaning money only on personal security, and deny to them the power of taking a pledge of stock as collateral security for notes or bills of exchange cashed by them. And, as I said before, a court of equity should never grant a preliminary injunction in a doubtful case.

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However, I have no doubt that the taking this collateral security from Bayne & Co. was a valid transaction, and whether it will ever avail the defendant any thing, it will depend upon the decisions of those tribunals before whom is now pending the question of the validity of the charter of the said railroad company, and the character of its stock.

The preliminary injunction asked for in this case is refused.

For authorities to sustain the view I have taken of the law governing this case, I refer to the following cases : *Bates v. Bank of Alabama*, 2 Ala. 462; *Magruder v. State Bank*, 18 Ark. 9; *Bank of Middleburg v. Bingham*, 33 Vt. 636; *Farmers' Bank v. Buechard*, 33 id. 348; and *Rock River Bank v. Sherwood*, 10 Wis. 230.

*Injunction refused.*

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# STEWART V. THE NATIONAL UNION BANK OF MARYLAND.

(2 Abbott, U. S., 424.)

*Loans in excess of one-tenth of capital.*

Loans by a National bank to an individual or company in excess of one-tenth of its paid-up capital are not void. The loan may be collected though the bank is exposed to forfeiture of its franchise and the officers participating are declared personally liable.\*

(Circuit Court, Fourth Circuit, District of Maryland, October, 1869.)

**D**EMURRER to a bill in equity.

GILES, J. The complainant in this case filed a general creditor's bill against the defendant, alleging, among other things, that he was and is a creditor of Bayne & Co. to a large amount; that Bayne & Co. are bankrupts; that the National Union Bank, the National Mechanics' Bank, and the National Exchange Bank, are National banks, organized under the act of Congress entitled "An act to provide a National currency," approved June 3, 1864; that section 29 of said act provides "that the total liabilities to any association of any person or of any company, corporation, or firm,

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\* See *Union Gold Hill Mining Co. v. Rocky Mountain National Bank*, ante, p. 151; *Shoemaker v. National Mechanics' Bank*, ante, p. 169.

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for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid ;" that on May 3, 1866, the loans to Bayne & Co. by the National Union Bank amounted to two hundred and eighty-seven thousand six hundred and forty-one dollars and thirty-one cents ; by the National Mechanics' Bank, to three hundred and seventy-seven thousand four hundred and forty-four dollars and seventeen cents ; and by the National Exchange Bank, to one hundred and forty thousand four hundred and thirty-one dollars and twenty-nine cents, which loans were made with the knowledge and permission of the directors of said banks, and were not within the reservations or provisos of section 29 ; that the largest part of the assets of Bayne & Co. are deposited with and held as collateral security by said National banks, defendants, for the illegal loans, so made by them to Bayne & Co. ; that of such collaterals, the National Mechanics' Bank held three hundred and eighty-five thousand eight hundred and sixty-four dollars, the National Union Bank, three hundred thousand one hundred and thirty-nine dollars, and the National Exchange Bank, one hundred and sixty-four thousand two hundred and fifty dollars ; that the capital stock of the said National Mechanics' Bank is six hundred thousand dollars ; of the said National Union Bank is one million two hundred thousand dollars, and of the National Exchange Bank four hundred thousand dollars ; that the loans to Bayne & Co. by said banks were, on May 3, 1866, largely in excess of the ten per cent of their respective capitals actually paid in, and therefore contrary to law, and a fraud on the rights of complainant and other creditors of Bayne & Co. The bill prays for a discovery of the amount and nature of said collaterals, also of all transactions between Bayne & Co. and the banks, and for an order of this court transferring the collaterals so held by the banks to the assignee in bankruptcy of Bayne & Co., for adjustment of rights between their creditors, for a decree in favor of complainant, and for general relief.

To all that part of the bill which attacks these loans made by the banks on the ground that they are void by section 29 of the act of 1864, and prays for a decree of this court ordering them to be transferred to the assignee of Bayne & Co., the banks demur ; and for cause of demurrer show "that according to the true con-



struction of the act of 1864, the complainant has no right to call upon this court to examine into and decide upon the matters above demurred to, but the same are examinable only at the instance and suit of the government of the United States and its authorized officer, and in conformity with the provisions of said act." "And that the said matters, as alleged, do not affect the validity of the said loan by these defendants to the said Bayne & Co., nor do they destroy, invalidate, or affect the title of these defendants to the said collaterals and securities."

The issues raised by this demurrer are two. First, the right of complainant to the relief sought in his bill against the banks; and second, the validity under the act of Congress of the loans so as aforesaid made by the said banks to Bayne & Co.

[The first issue was decided against the complainant on the ground that if the securities did not vest in the bank they belonged to the general assignee of Bayne & Co.]

This disposes of that part of the case now submitted to me, and I might rest my decision here; but as the second issue raised by the demurrer has been argued at length and with great ability by the complainant and the learned counsel engaged in the cause, and as I have carefully examined all the authorities referred to, I shall state briefly the conclusions to which I have arrived as to the true construction of section 29, and of the rights of the parties to such loans as are here alleged. Now, it is observable that this section only provides, "that the total liabilities to any association, of any person, or of any company, corporation or firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock actually paid in." It contains no penalty, and no provision "that such loans shall be void."

In the very next section (§ 30), which regulates the rate of interest, it is provided that "the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid, shall be held and adjudged a forfeiture of the entire interest," etc. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same.

So in section 31 it is enacted that every association in certain cities "shall always keep on hand, in lawful money, twenty-five

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per centum of the aggregate amount of its notes in circulation and its deposits. And if any association, whose lawful money shall fall below the amount aforesaid required to be kept on hand, shall fail, for thirty days after notice, to make good such reserve, the Comptroller of the Currency, with the concurrence of the Secretary of the Treasury, may appoint a receiver to wind up the business of such association."

See, also, section 52, in which all transfers of the notes, bonds, and other evidences of debt owing to any association, and of any and all property belonging to the association, made after the commission of an act of bankruptcy, etc., are declared null and void.

Now, when you read these sections and find no such provision of forfeiture in section 29, but find that in section 53 provision is made, "that if the directors of any association shall knowingly violate any of the provisions of this act, all the rights, privileges, and franchises of the association, derived from this act, shall be thereby forfeited — such violation shall, however, be determined and adjudged by a proper District or Circuit Court, in a suit brought for that purpose by the Comptroller of the Currency, in his own name, before the association shall be declared dissolved" — the conclusion seems to be irresistible, that Congress never intended by section 29 to forfeit all loans made in excess of the amount specified in section 29, no matter whether they were made through inadvertence or by mistake, for the forfeiture provided for in section 53 depends upon the guilty knowledge of officers making it.

The general banking powers are granted by section 8 of the act in the following terms: "And exercise under this act all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, by receiving deposits, by buying and selling exchange, coin, and bullion, by loaning money on personal security, and by obtaining, issuing, and circulating notes according to the provisions of this act." The granting of banking powers is full and ample in this section, and in view of the whole act it appears to me that section 29, like many other sections of the act, is directory only, and for its violation there is no forfeiture but the one provided for in section 53. That section, it is admitted, applies to all violations of section 29, with guilty knowledge, and there can be no clearer rule for the interpretation of statutes than to hold that, where Congress has expressly provided

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a penalty for the commission of any act, you are not so to construe the statute as to add, in addition, any common law forfeiture or penalty. So that it appears to me that although these loans made by defendants, the three banking associations above named, exceeded in amount one-tenth part of the amount of their capital stocks actually paid in, the loans are not void, and if the associations were now in court, seeking to recover the same, I should have great difficulty in permitting Bayne & Co., or any one claiming through them, to set up this defense.

But can there be any doubt of this principle, that where the contracts are executed, even if the court would not have enforced them, the court will leave the parties where it finds them, giving aid or relief to neither? The learned counsel for the complainant, in his very full argument, seemed to feel the force of this principle, and to try and escape from its application. He contended that it did not apply to this case, and if these defendants could not sustain an action in a court of law on these contracts, the court must overrule the demurrer.

The cases to which he referred, I have examined, and it does not appear to me that they sustain this position. In the case of *Bank of United States v. Owens*, the court decided that the bank could not recover upon a note which had been discounted at more than six per cent interest. The bank charter forbid the taking of a greater rate of interest than six per cent, but it did not declare such a contract void. The court held such a contract void on general principles, and that courts could not lend their aid to enforce such contracts. I have examined the charter of the bank, and it contains no clause imposing any penalty whatever on the taking of more than six per cent interest. It was, then, a prohibition without any specific penalty, and Congress must be supposed to have left the violation of the section to the common law penalty of a denial by the courts to enforce such a contract.

The case of *Leavitt v. Palmer*, 3 N. Y. (3 Comst.) 19, was decided on similar grounds. In that case the court held that the notes issued by an institution in violation of the provisions of the general banking law of New York, which might circulate as a currency, and the deed of trust to secure the same, were void. It did not touch the question of the validity of the original advance by the London house.

The case of *Seneca County Bank v. Lamb*, 26 Barb. 595, only

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Stewart v. The National Union Bank of Maryland.

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decides what the Supreme Court had decided in 2 Pet., that a bank that has discounted paper, taking more than six per cent interest, cannot recover upon the paper thus discounted. The court, in their opinion, says: "It will leave the parties to such a contract where it finds them."

To the same effect is the case of the *Bank of Chillicothe v. Swayne*, 8 Ohio, 280. and the case of the *Miamai Exporting Co. v. Clark*, 13 id. 1.

In the case of *Albert v. Savings Bank of Baltimore*, 2 Md. 160, the court only decided that, although the contract was executed, yet the *cestui que* trust whose property had been assigned unlawfully to the bank could have relief in a court of equity. That is not this case.

The case of *Coppell v. Hall*, 7 Wall. 542, only decided that upon a contract for the purchase of cotton in violation of the non-intercourse acts, during the late civil war, there could be no recovery in the courts of the United States.

The case of *Hagan v. Walker*, 14 How. 29, is not applicable to this case; and the case of *Chancy v. Duke*, 10 Gill & J. 11, is, if applicable at all, in favor of the defendants. The Court of Appeals in that case held that the mere omission of the vendor of a slave to give a bill of sale as required by the act of 1817 (ch. 112), would not prevent his maintaining an action for the purchase-money.

I consider the law of this case settled by the decisions to which I shall now refer. In the case of *Mott v. United States Trust Co.*, 19 Barb. 569, the court held that a person who has borrowed money from a savings institution upon his promissory note, secured by a pledge of bank stock, was not entitled to an injunction to prevent the prosecution of the note on the ground that the savings bank was prohibited by its charter from making loans of that description. So, in the case of *Tracy v. Talmadge*, 14 N. Y. (4 Kern.) 162, the court held, that while the certificates of deposit given in violation of law were void, yet that the plaintiff could recover whatever the stocks sold were worth at the time of sale leaving the contract of sale, so far as it had been executed by payment or its equivalent, undisturbed; and in the case of *Bates v. Bank of the State of Alabama*, 2 Ala. 459, the court decided that a clause in the bank charter similar to section 29 of the act of 1864, was directory merely, and that if it were disregarded, no one party to its violation could take advantage of it.

## Petition of Platt.

The case of *Harris v. Runnels*, 12 How. 80, is directly in point, and sustains the view I have taken of the construction of section 29. That was an action brought to recover the price of slaves brought into Mississippi, in contravention of a statute of that State regulating the importation of slaves. Section 4 provided that no slaves should be brought into the State without a previous certificate, etc., being obtained. Section 6 declared that both the seller and buyer of such slaves shall pay one hundred dollars for every slave so sold and imported in violation of the law. The Supreme Court says: that "the two sections, considered conjunctively, seem to us to imply that the penalty only, without any loss to either the seller or buyer, was to be inflicted," and the court held that the contract of sale was not void.

Now, although by the bill as originally filed, it would appear that the said banks held collaterals to a larger amount than their loans and advances, yet by the amended schedule and agreement of counsel in reference to the same, it is clearly shown that the advance made by the banks to Bayne & Co. far exceeds in amount the value of the collaterals they received from said firm.

The court, for the reason I have given, will sustain the demurrer filed by the banks, and will sign a decree dismissing the bill as to them.

*Bill dismissed.*

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PETITION OF PLATT.

(1 Benedict, 534.)

*Receiver of a National Bank — Compromise of debts — District Court may order.*

A District Court of the United States may order the receiver of a National bank to compromise doubtful debts under section 50 of the National Banking Act (13 Stat. at Large, 115), which authorizes receivers to compromise such debts "on the order of a court of record of competent jurisdiction."

THIS was a petition of Platt, as receiver of the Farmers and Citizens' National Bank, made to the United States District Court for the Eastern District of New York, for authority to com-

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Platt v. Beach.

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promise a debt. Section 50 of the National Banking Act provides that the receiver may compromise doubtful debts "on the order of a court of record of competent jurisdiction." The question arose whether this court was a court of "competent jurisdiction." The court, BENEDICT, J., after consideration, decided that it had jurisdiction, and ordered the matter to be referred to a commissioner to take proof of the facts of the case with his opinion thereon.

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PLATT V. BEACH.

(2 Benedict, 303.)

*Receiver is an officer of the United States—Jurisdiction.*

The receiver of a National bank appointed by the Comptroller of the Currency is an officer of the United States, and therefore the District Court has jurisdiction of an action at common law to collect a claim due the bank at the time of the receiver's appointment.

(District Court, Eastern District of New York.)

**A**CTION for money. The plaintiff was appointed by the Comptroller of the Currency, under the 31st section of the National Banking Act, receiver of the Farmers and Citizens' National Bank of Brooklyn, and brought this action in the United States District Court for the Eastern District of New York, to recover a debt alleged to have been due from defendant to the bank at the time of his appointment.

The defendant demurred to the complaint on the grounds :

*First.* That the court had no jurisdiction of the subject of the action.

*Second.* That the plaintiff had not the legal capacity to sue.

*Third.* That the complaint did not state facts sufficient to constitute a cause of action.

*R. H. Huntley*, in support of the demurrer.

*B. F. Tracy*, District Attorney, and *R. D. Benedict*, for plaintiff.

BENEDICT, J. This is an action at common law, brought by a receiver of a National bank. A demurrer has been interposed to

the complaint, for the purpose of raising the question of the right of the plaintiff to maintain such an action in a court of the United States. The claim to this right, on the part of the plaintiff, is based solely upon the fourth section of the act of March 3d, 1815, it being conceded that there is no provision in the act creating the National banks, which expressly gives to the National courts jurisdiction of such an action. The provision in the act of 1815 relied on, confers upon the District and Circuit Courts of the United States, jurisdiction of "all suits at common law where the United States or any officer thereof, under the authority of any act of Congress, shall sue;" and the question is, whether a receiver of a National bank appointed by the Comptroller of the Currency, with the concurrence of the Secretary of the Treasury, in accordance with the provision in section 31 of the act of June 3d, 1864 (vol. 13, chap. 10), which provides for the creation and winding up of the National banks, is an officer of the United States within the meaning of the fourth section of the act of 1815 above referred to? As to the construction of this latter act, it can hardly be doubted, I apprehend, that it includes all persons holding office under any act of Congress, whose appointment is required, by law, to be made in the mode prescribed by the Constitution for the appointment of officers of the United States. The provision of the Constitution (art. 2, § 2, sub. 2) is this:

"The President shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may, by law, vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments."

If, then, this receiver, who is appointed under an act of Congress to perform certain official duties by virtue of the act, is by law required to be appointed by the President, a court of law, or a head of a department, he must be deemed to have the right, under the act of 1815, to resort to this court to bring such actions as he may be required to bring in the discharge of the duties imposed upon him by law. The mode of his appointment is prescribed in the same provision which provides for the appointment of such a receiver, as follows. "The Comptroller of the Currency may, with

the concurrence of the Secretary of the Treasury, appoint a receiver to wind up the business of such association, as provided by the act." (§ 13, Stat., p. 709.) An appointment so made is equivalent in law to an appointment by the Secretary of the Treasury, who is the head of a department. This same question has arisen in regard to inspectors of the customs who are appointed under the act of March 2, 1799, which provides that the collector "shall, with the approbation of the principal officer of the treasury department, employ proper persons as weighers, gaugers, measurers and inspectors." Under this act it was long ago decided that inspectors of the customs were, in law, officers appointed by the head of the treasury department. *United States v. Barton*, Gilpin, 439; *United States v. Morse*, 3 Story, 87; *Sanford v. Boyd*, 2 Cranch's C. C. 78; *Ex parte Smith*, id. 693. The words of the Banking Act are certainly as strong as those used in the act of 1799, and must be held to have the like effect. It follows, then, that the plaintiff is an officer of the United States as defined by the Constitution, and accordingly within the meaning of the act of March 3d, 1815. The nature of the duties imposed upon a receiver of a National bank also leads to the same conclusion. These duties are not defined by any contract, but by law and rule prescribed by the government. They are similar to those appertaining to an ordinary receiver appointed by a court. But such receivers have always been considered to be officers (Bouv. Law Dict., word "receiver;" Edwards on Receivers, p. 3), and they are officers of the court which appoints them. The plaintiff, then, is an officer, and as it is not seen how he can be considered to be an officer of any court, he must be an officer of the government which appoints him, into whose treasury he is required to pay all moneys he shall collect, by whose district attorney he is required by law to be represented in court, and under the direction and supervision of whose Solicitor of the Treasury all his suits and proceedings are to be conducted (§ 56). The judgment must accordingly be in favor of the plaintiff upon the demurrer, with leave to the defendant to answer on payment of costs.



## IN THE MATTER OF VAN CAMPEN.

(2 Benedict, 419.)

*Embezzlement and false entries by officers of National banks.*

The president of a National bank was charged before a United States Commissioner with embezzlement of the funds of the bank, and with having made false entries in its books, and, after examination, was held for trial. The proceedings having been brought before the District Court for review by *habeas corpus*, and *certiorari*, held, (1) that the court would examine the evidence and do what the commissioner ought to have done; (2) that if the evidence showed probable cause of the defendant's guilt he was rightfully held for trial; (3) that proof of the *de facto* existence of a bank called a National bank and that the defendant acted as president of it was sufficient to establish the legal incorporation of such bank and of the defendant's official connection therewith.

Where false entries are made in the books of a bank by a clerk in the bank, by direction of the president, the latter is liable therefor as principal.

An intent to defraud a bank is to be inferred from the fact of embezzlement. Where the president of a National bank, charged as trustee with the administration of the funds of the bank in his hands, converts them to his own use, he embezzles and abstracts them, within section 55 of the National Banking Act (13 Stat. at Large, 116) unless he shows authority for so doing.

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(District Court, Southern District of New York.)

PETITION for a writ of *habeas corpus* and of *certiorari*. The opinion states the case.

*C. A. Seward* and *J. L. Ward*, for the petitioner.

*B. K. Phelps*, assistant district attorney, for the United States.

BLATCHFORD, J. The prisoner was arrested in this district, on warrant issued by the marshal of this district, on the 30th of April, 1868, by Commissioner Betts, a commissioner of the Circuit Court for this district, on a complaint made on oath before him, charging the prisoner with having, at Elmira, Northern District of New York, at various times specified in the warrant, during the year 1867, and while president of the First National Bank

of Elmira, "an association and body corporate, created and organized under and by virtue of the act of Congress, entitled 'An act to provide a National currency, secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof,' approved February 25th, 1863, and the acts amendatory thereof," embezzled, abstracted, and willfully misapplied moneys, funds and credits of the association, to the amount of \$36,000, the property of the association, and a certain draft for \$7,000, the property of the association, and, with intent to defraud the association, and to deceive the officers and agents appointed to examine its affairs, and especially the bank examiner of the United States, made divers false entries in the books of the association, and in its reports and statements, which false entries are set forth particularly in the complaint. The prisoner was brought before the commissioner, and an examination of witnesses on the part of the United States, in support of the charge, took place on the 8th and 11th of May. The prisoner appeared by counsel, who cross-examined the witnesses, on the part of the United States; but no witnesses were examined, or testimony put in, on the part of the prisoner. On the 12th day of May, after the case had been summed up before the commissioner, by the counsel on both sides, he committed the prisoner to the custody of the marshal for this district, for trial in the Northern District of New York. At this stage of the proceedings a petition was presented to this court by the prisoner, praying for a writ of *habeas corpus* to the marshal, and a writ of *certiorari* to the commissioner, in order that a review might be had, by this court, of the ground on which the prisoner was committed. The writs were issued on the 12th day of May, and under them the prisoner has been brought before this court, and the proceedings and evidence before the commissioner have been returned to this court, and the case has been fully argued on an application by the prisoner to be discharged from custody.

The particular offenses in regard to which testimony was taken before the commissioner are made such by the fifty-fifth section of the act of June 3d, 1864 (13 U. S. Stat. at Large, 116). That section provides, that "every president, director, cashier, teller, clerk, or agent of any association, who shall embezzle, abstract, or willfully misapply any of the moneys, funds, or credits of the association \* \* \* or shall make any false entry in any book, report, or statement of the association, with intent, in either case,

to injure or defraud the association, or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by imprisonment, not less than five, nor more than ten years."

It is settled by authoritative decisions, that this court, in reviewing, on *habeas corpus* and *certiorari*, the action of a committing magistrate, who acts under the laws of the United States, will examine the evidence on which the commitment was grounded, and will do that which the magistrates ought to have done. *Ex parte Bollman*, 4 Cranch, 75, 114; *In re Martin*, 5 Blatch. C. C. 303.

I have examined the testimony put in before the commissioner in this case, and am entirely satisfied that there is sufficient evidence to hold the prisoner for trial, as having been guilty of embezzlement, and of making false entries, within the provisions of the statute cited. In *Ex parte Bollman*, 4 Cranch, 75, 125, Chief Justice MARSHALL says, that the inquiry, in a case like this, being one which, without deciding upon guilt, precedes the institution of a prosecution, the question to be determined is, whether the accused shall be discharged or held to trial; and, in that case, as well as in the case of Burr's trial (1 Burr's Trial, 11), he cites, with approbation, the remark of Blackstone, that if, upon such an inquiry, it manifestly appears that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only is it lawful totally to discharge him; otherwise he must either be committed to prison, or give bail.

Chief Justice MARSHALL adds (1 Burr's Trial, 11), that the foundation of the proceeding must be a probable cause can only be done away with in the manner stated by Blackstone. This probable cause (*Ex parte Bollman*, 4 Cranch, 75, 130) must be proved by testimony in itself legal, and which, though, from the nature of the case, it must be *ex parte*, ought, in most other respects, to be such as a court and jury might hear. In this case there is probable cause shown, on legal testimony, to believe the prisoner guilty of embezzlement, and of making false entries, within the statute, and this probable cause has not been done away with in any manner.

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In the matter of Van Campen.

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It is objected that no evidence was given before the commissioner, of the existence of the bank, or of the prisoner's official connection therewith. The record does not show that any such objection was taken before the commissioner. If it had been, the presumption from the evidence is, that the defect could have been supplied by proper official papers. The evidence against the prisoner is of such a character, that, even if this objection could prevail, I should not be at liberty to discharge the prisoner, but would be obliged to hold him, to give an opportunity to the prosecution to supply the proof wanting. But I think there is sufficient *prima facie* proof on both points. Two witnesses testified, without objection of the prisoner, to the existence *de facto* of an institution called the First National Bank of Elmira, and to the fact that the prisoner acted as president of it until October, 1867, when he resigned. There is also a great deal of testimony as to acts done by the prisoner as president, and directions given by him in that capacity. This is enough on an inquiry of this nature. It is sufficient, not only on the charge of embezzlement, but also on the charge of making false entries, with intent to defraud the bank. *The People v. Caryl*, 12 Wend. 547; *The People v. Davis*, 21 id. 309, 313; *The People v. Peabody*, 25 id. 472; *Johnson v. The People*, 4 Denio, 364, 368; *The People v. Dennis*, 1 Parker's Cr. Rep. 469; *The People v. Chadwick*, 2 id. 163.

In regard to the charge of making false entries, it is objected, that the prisoner did not personally make the false entries, but that they were made by a clerk in the bank, by the direction of the prisoner. This is sufficient to make the prisoner a principal in the offense, and to constitute a making of the entries by him. *United States v. Wilson*, Baldwin's C. C. R. 78, 103.

An intent to defraud the bank is to be inferred from the fact of the embezzlement, and an intent to deceive its officers from the circumstances in evidence attending the false entries.

The indebtedness of the prisoner to the bank is claimed to be merely an overdraft, and not criminal. This is not so. Where a president of a bank, charged, as a trustee, with the administration of the funds of the bank in his hands, converts them to his own use, he embezzles and abstracts them, within the statute referred to, unless he shows authority for so doing. There is sufficient evidence that the prisoner, while acting as president of the bank, converted to his own use over \$30,000 of the moneys of the bank, and he shows no warrant for so doing.

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Evansville National Bank v. Metropolitan National Bank.

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The writ of *habeas corpus* is discharged, and a warrant will issue to the marshal, under section 33 of the act of September 24th, 1789 (1 U. S. Stat. at Large, 91), for the removal of the prisoner to the Northern District of New York.

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## EVANSVILLE NATIONAL BANK v. METROPOLITAN NATIONAL BANK.

(2 Bissell, 527.)

*National banks have no lien on their own stock.*

The by-laws of a National bank provided that no transfer of the stock should be made by any shareholder who was indebted to the bank, and this provision was also included in the certificates of stock. *Held* invalid, and that a transfer of stock by a shareholder while indebted to the bank was good.\*

(Circuit Court, Seventh Circuit, District of Indiana.)

**A** PPEAL from the District Court.

Action by the Evansville National Bank to recover two hundred shares of its capital stock. Said bank was organized under the act of 1864. One of its articles of association provided that the directors might prohibit the transfer of stock without their consent, and in pursuance thereof the directors, by by-law, prohibited the transfer of shares of stock without their consent by any shareholder who was indebted to the bank, and this provision was incorporated in the certificates of stock. After the adoption of such by-law, Watt, Crane & Co. became the owners of two hundred shares of stock which, while they were indebted to the bank, they transferred to the defendants to secure money loaned them.

The firm of Watt, Crane & Co. becoming bankrupt, the Evansville National Bank brought this action to recover the said stock.

The District Court decided for the defendant.

*Asa Inglehart*, for plaintiff.

*Hendricks, Hord & Hendricks*, for defendant.

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\* This case was appealed to the Supreme Court, and affirmed by a divided court, and consequently no opinion was given. See *Bullard v. Bank*, ante, p. 93.

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Evansville National Bank v. Metropolitan National Bank.

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DRUMMOND, J. The only question in the case is whether this by-law was valid under the law of June 3d, 1864. The 8th section of that act authorizes the board of directors to make by-laws, but declares they must not be inconsistent with its provisions.

The 35th section declares that no association shall make any loans, or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless to prevent loss on a debt previously contracted in good faith.

The counsel for the plaintiff, in the able argument he has presented, claims that the operation of the by-law upon the shares of stock, because of the indebtedness of Watts, Crane & Co., and their transfer to the Metropolitan Bank, without the consent of the board of directors, was not a loan or discount made on the security of the shares, that there must be a distinct assignment or hypothecation of the stock as security for a loan or discount made, and some authorities have been cited which seem to sustain that principle. But if a by-law declares, in substance and effect, that for all loans or discounts made to the shareholder a lien shall exist against his stock, the result would be the same as if there were a separate transaction and security given in each case. The shareholder always has the credit on the security of his stock, and thus the very object is accomplished which the 35th section sought to prevent, the absorption of the shares into the assets of the bank. And it will be observed that the law only allows the stock to be taken by the bank as security, or purchased or held to avoid loss on a debt previously contracted in good faith, and even then the stock is to be retained by the bank only a limited time. An extended examination of the authorities cited by counsel is unnecessary, because in the case of the *First National Bank of South Bend v. Lanier*, recently decided by the Supreme Court of the United States, 11 Wall. 369 (*ante*, p. 70), the question involved here is discussed by that court, and a principle established that is decisive of this case.

In that case the bank had made a by-law, declaring that the stock of the bank should be transferable only on its books, subject to the provision of the 36th section of the act of 1863 (12 U. S. Statutes at Large, 675) (by which a shareholder was prevented from transferring his stock when he owed the bank).

The bank sought to avail itself of this by-law, notwithstanding the repeal of the 36th section, by the act of 1864, and the court held that that could not be done. This was in effect deciding

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Collins v. Chicago.

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that no such by-law could be in force under the provisions of the act of 1864. The language of the court is : "Congress evidently intended, by leaving out of the law of 1864 the 36th section of the act of 1863, to 'relieve the holders of bank shares from the restrictions imposed' by that section. The policy on the subject was changed, 'and the directors of banking associations were in effect' notified that thereafter they must deal with their shareholders as they dealt with other people. As the restrictions 'fell, so did that part of the by-law relating to the subject fall' with them."

The decree of the District Court is affirmed.

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COLLINS v. CHICAGO.

(4 Bissell, 472.)

*State Taxation of National banks.*

The capital stock of a National bank cannot be assessed, as such, by State authority.

The only way such stock can be reached is by assessment of the shares of the different stockholders.

(Circuit Court, Seventh Circuit, Northern District of Illinois.)

DRUMMOND, J. The material facts in this case are that the city caused to be assessed, for the payment of taxes, under the law of Illinois, the stock of the First National Bank of this city, as so much capital in the aggregate, with the intention of having the tax levied on the sum total of the capital stock of the bank. Plaintiff, a non-resident stockholder, has applied to have the assessment set aside as illegal.

The assessment is in violation of the acts of Congress authorizing the existence of National banks. The capital stock of the bank, as such, cannot be assessed under State authority. The only way that such stock can be reached is to assess the shares of the different stockholders in the same manner that assessments are made in other cases against property owned by the citizens and inhabitants of the State.

## IN RE MANUFACTURERS' NATIONAL BANK.

(5 Bissell, 499.)

*National banks not subject to the bankrupt act.*

National banks are not subject to the bankrupt act, and bankruptcy courts have no jurisdiction as against such associations. If insolvent they can be wound up only in the mode provided by the National Banking Act.\*

(District Court, Northern District of Illinois.)

PETITION in bankruptcy for a rule on the Manufacturers' National Bank of Chicago, to show cause why it should not be adjudged a bankrupt. The opinion states the case.

*Harding, McCoy & Pratt*, and *T. C. Whiteside*, for petitioners.

*Lawrence, Winston, Campbell & Lawrence*, and *Ayer & Kales*, for the bank.

BLODGETT, J. On the 15th day of November last Messrs. R. J. Smith & Co. filed in this court their petition setting forth that they are creditors of the Manufacturers' National Bank of this city, for money deposited with said bank in due course of business, and alleging that the said bank had suspended payment on its commercial paper for over fourteen days, and had, when insolvent, made preferential payments, for which acts they prayed that the bank be adjudged bankrupt.

Being aware that grave doubts had been expressed by many lawyers and business men as to the application of the bankrupt law to National banks, I directed notice of the application for a rule to show cause to be served on the officers of the bank, and have heard arguments for and against the application.

The law now in force for the organization and government of National banks was enacted on the 3d of June, 1864 (13 U. S. Statutes at Large, p. 99), and has been amended by the act of February 4, 1868 (15 id. 34), the act of Feb. 19, 1869 (15 id. 270),

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\*See *Irons v. The Manufacturers' National Bank*, post.



the act of July 12, 1870 (16 id. 251), and the act of March 3, 1873 (17 id. 603). Embodied in the original act are very full and ample provisions, for winding up and settling the affairs of these banking associations, mainly through the Federal courts. The fundamental purpose of the act and its amendments was to provide a National currency and insure its prompt redemption, and incidentally, to provide banking or fiscal agencies through which the ordinary financial business of the country could be safely transacted.

The leading features of the system were:

1. The security of the circulating notes of those banks by the pledge of Government bonds in the hands of the Treasurer of the United States, and in case of the failure of the bank to redeem its notes, then redemption of those notes by the Government, for which it is to be reimbursed by the proceeds of the bonds deposited and a first lien on all the assets of the bank.

2. The responsibility of the stockholders of the bank to the extent of the par value of the stock held by them respectively, in addition to the amount invested in their shares.

3. The whole system to be under the surveillance of the Comptroller of the Currency, with full powers to examine into the affairs of each bank, and, in cases of non-compliance with the provisions of the law, to appoint a receiver to administer and wind up their affairs.

On the 2d day of March, 1867, Congress passed an act to establish a uniform system of bankruptcy throughout the United States; and by the thirty-seventh section of said act it is declared "that the provisions of this act shall apply to all moneyed, business, or commercial corporations and joint-stock companies," and by the third clause of the same section it is declared that "all payments, conveyances, and assignments declared fraudulent and void by this act, when made by a debtor, shall in like manner and to the like extent and with like remedies be fraudulent and void when made by a corporation or company."

The forty-eighth section declares that the word "person," when used in this act, shall be held to include and mean "corporation," and by the ninth clause of the thirty-ninth section it is made an act of bankruptcy for any "banker" to suspend payment of his commercial paper for fourteen days.

The bankrupt law is the latest expression of the legislative will, and its general terms and provisions must be held to repeal all pre-

vious statutes necessarily incompatible with it. The question then is, does the bankrupt law repeal and supersede the provisions in the Currency Act for winding up the affairs of insolvent National banks? or can its provisions be applied to those corporations and leave intact the provisions of the Currency Act on the same subject? There is no doubt of the soundness of the general rule of interpretation cited by the counsel for the respondent: That a statute, although so general in its terms that its letter would comprehend all classes of persons and things to which it can relate, will nevertheless be construed by the courts as not applying to a particular class which has been especially provided for and regulated by another statute relating solely to such class, if there is no language in the general statute, repealing the former statute, or in any manner referring to it. *Hume v. Gossett*, 43 Ill. 297; *The People ex rel. v. Miner*, 46 Ill. 384.

A thing which is in the letter of a statute is not within the statute unless it be within the intention of the makers. Bacon's Abridgment, title Statute, 385.

"Where the intention of the legislature is not apparent to that purpose, the general words of an other and later statute shall not repeal the particular provisions of a former one." Dwaris on Statutes, 117, quoted from Coke.

The rule is thus stated in Sedgwick, on the construction of statutory and constitutional law, p. 97 (2nd ed.):

"In regard to the mode in which laws may be repealed by subsequent legislation, it is laid down as a rule, that a general statute without negative words will not repeal the particular provisions of a former one, unless the two acts are irreconcilably inconsistent. The reason and philosophy of the rule is that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the later act such a construction, in order that its words shall have any meaning at all."

The Currency Act provides for the appointment of a receiver to wind up the affairs of a National bank in the following cases:

1. For not keeping good a surplus — 12th section.
2. For not keeping stock at minimum — 15th section.
3. For not keeping good its reserve — 31st section.

4. For not selecting a place for the redemption of its notes — 32d section.

5. For holding its own stock over six months — 35th section.

6. For non-payment of its circulating notes — 50th section.

7. For improperly certifying a check — section 1, act March 3, 1869.

8. For failure to pay up capital stock, and for allowing same to become and remain impaired by losses — section 1, act March 3, 1873.

Upon the happening of either of these contingencies the Comptroller may appoint a receiver to take possession of all the books, records and assets of the corporation, who shall proceed to convert the assets into money under the direction of a court of competent jurisdiction. And the money so realized shall be paid over to the treasury of the United States, subject to the order of the Comptroller, who, after deducting in full whatever amount shall be due to the United States, shall distribute the balance ratably among the creditors of the bank, the claims of creditors to be proven before the Comptroller, or adjudicated in a court of competent jurisdiction.

By the 52d section the “application of its assets in the manner prescribed by this act, with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void.”

And by the 48th section it is made unlawful for any such bank, after suffering a protest of its circulating notes, and after notice from the Comptroller, to in any manner prosecute the business of banking, except to receive and safely keep its money and deliver special deposits.

And by the 53d. section, any violation of the provisions of the Currency Act, done knowingly, by either a bank, or its officers or agents, works a forfeiture of all its rights and franchises, to be adjudged by a Federal court at the suit of the Comptroller.

The 8th section provides that said corporations, *i. e.*, National banks, may sue and be sued, complain and defend, in any court of law and equity as fully as natural persons.

And by the 57th section it is declared, that “suits, actions and proceedings against any association under this act may be had in any circuit, district or territorial court of the United States, held within the district in which such association may be established, or

in any State, county, or municipal court in the county or city in which such association is located, having jurisdiction in similar cases." And by the amendment to this section, made by the act of March 3, 1873, it is further provided that "no attachment, injunction or execution shall be issued against such association or its property before final judgment."

I am not aware that any adjudication has yet been made determining what is an "act of insolvency" within the intent and meaning of the 52d section, but it seems to me to be an act which shows the bank to be insolvent; such as non-payment of its circulating notes, bills of exchange, or certificates of deposits; failure to make good the impairment of capital, or to keep good its surplus or reserve; in fact, any act which shows that the bank is unable to meet its liabilities as they mature, or to perform those duties which the law imposes for the purpose of sustaining its credit.

It will thus be seen that while the Currency Act does not specify in detail, and provide for all the specific acts of bankruptcy enumerated in the bankrupt law, it yet does furnish, through the functions of an important public officer — the Comptroller of the Currency — a very complete and detailed scheme or plan for administering the affairs of an insolvent National bank. It is true, there is no provision for an individual creditor's putting this machinery in motion. But the presumption is that Congress deemed it wiser to leave this duty to an impartial public officer rather than intrust it to the hasty, inconsiderate, and perhaps selfish action of one or more creditors. It was probably thought that the necessity of maintaining the public confidence in the system was such as would compel the Comptroller to act in all cases when a bank had become derelict or discredited, and that this consideration, together with the clear obligations of duty, thrown upon the officer, would be sufficient to insure his action in all cases when he acquired the right to do so. At all events, the law as it was enacted contained ample and specific provisions for creating and managing these corporations, and for administering their affairs when they became unable or refused to perform their public functions.

The system has been in operation nearly ten years. Over two thousand banks have been organized under it. Of these, twenty-one have been wound up through the agency of the Comptroller and a receiver — the great part of them since the enactment of the bankrupt law. All the legislation of Congress has looked toward the

perfecting and perpetuation of the system, and ought we now to say that Congress, by the enactment of the general bankrupt law, intended to place these corporations under the provisions of that law, and to repeal the elaborate plan which it had specially furnished for winding up their affairs when they became insolvent or incapable of transacting banking business ?

That it did not intend to repeal them is conclusively evidenced by the fact that in two of the important amendatory acts, those of March 3d, 1869 (15 U. S. Stat. at Large, 326), and March 3d, 1873, especial reference is made to those winding-up provisions of the original act, and they are treated as being in full force. So, too, in several cases which have been before the Supreme Court since the enactment of the bankrupt law, reference has been made to these winding-up powers as still in force.

It being clear, then, that Congress did not intend to repeal the winding-up clauses of the Currency Act, the question arises, did it intend that the two remedies, that is, the one given by the Currency Act and the one given by the Bankrupt Act, should exist as co-ordinate or concurrent remedies, and the affairs of an insolvent National bank be administered by that tribunal which first acquired control.

This construction might be admitted if the two were entirely compatible with each other, or if each was equally as complete as the other ; that is, if each could reach and administer upon all the assets of the debtor bank so as to leave nothing to be done by the other.

But we find upon examination that the important duty of paying the holders of circulating notes, and distributing the proceeds of the bonds deposited to secure them on the surplus of those bonds, and of enforcing the liability of stockholders, is left with the Comptroller, and can only be enforced by or through him. This latter point was fully discussed and decided by the Supreme Court (*Kennedy v. Gibson*, 8 Wall. 498), where it was expressly held that the Comptroller alone could enforce the personal liability clause. The court says : " The receiver is the instrument of the Comptroller. He is appointed by the Comptroller, and the power of appointment carries with it the power of removal. It is for the Comptroller to decide when it is necessary to institute proceedings against stockholders to enforce their personal liability, and whether the whole or a part, and, if a part, how much shall be collected.

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These questions are referred to his judgment and discretion, and his determination is conclusive. The stockholders cannot controvert it.

"It is not to be questioned in the litigation that may ensue. He may make it at such times as he shall deem proper, and upon such data as shall be satisfactory to him. This action on his part is indispensable, when the personal liability of the stockholders is sought to be enforced and must precede the institution of a suit by a receiver. The claims of creditors may be proved before the Comptroller or established by suit against the association. Creditors must seek their remedy through the Comptroller in the manner prescribed by statute."

Much stress was laid by the attorneys for petitioners upon the inadequacy of the security for creditors under the Currency Act, mainly because creditors could not of their own motion initiate winding-up proceedings, but how much more inadequate would the bankrupt court be to the same end if it cannot reach or distribute assets, and, perhaps, must pay what it gets over to a government officer for distribution?

I do not say that an assignee would be obliged to pay over to the Treasurer, but that there is grave ground for a claim that he should do so, and that collision might grow out of such claim.

The relief which could be afforded to the creditors of a National bank, then, being so incomplete, I cannot think it was the intention of Congress to clothe bankrupt courts with jurisdiction over this class of corporations. I have already cited the evidence which shows to my mind that Congress did not intend to repeal the winding-up provisions of the Currency Act by the passage of the bankrupt law, and a comparison of the provisions of the two acts show with equal clearness to my mind that it did not intend to inject the provisions of the Bankrupt Act into the Currency Act, so that creditors could apply the remedies of the Bankrupt Act, and the Comptroller the remedies of the Currency Act; because such a construction would inevitably produce collisions and conflicts of jurisdiction, and the remedies given by the Bankrupt Act would be so far unavailing in regard to important assets as to make it evident that there was no intention to apply such a remedy. Suppose this court were to adjudge this respondent bankrupt to-day, and send its messenger and assignee to take possession of the assets, the officer of the court could in no event enforce the personal lia-

bility clause, or obtain possession of the government bonds deposited to secure the circulation, or any surplus of those bonds after fully redeeming the circulation. Those assets are beyond the reach of this court or its officers, and can only be approached by the way of the Comptroller and his receiver. Then why should this court take cognizance of a case that it cannot administer?

Why not, rather, say that Congress has acted upon the subject-matter of insolvent National banks and made specific provisions for administering their affairs, and inasmuch as the general bankrupt law has not expressly repealed these specific provisions, nor necessarily suspended them, the courts will presume it was the intention of Congress to except this class of corporations from the operation of the later statute? Such conclusion seems to me consistent with authority, and is, in fact, the only conclusion that will not lead to inextricable complication and conflict.

But it is urged that the Currency Act makes these corporations liable to all suits and actions which might be brought against natural persons, and that they can, therefore, be proceeded against in bankruptcy.

A sufficient answer to this might be found in the fact that when the Currency Act was passed there was no bankrupt law in force, and therefore the general language must be held subject to this limitation. But, I take it, there is no doubt that the legislative power which creates an artificial person or corporation can also prescribe what remedies shall be had against it, and that such remedies would be held to be exclusive, and that the provisions of the general bankrupt law would not be held to apply to corporations at all, but for the express terms of the act. Should they, then, be held to apply to a class of corporations which have, as it seems, a bankrupt law of their own ingrained into their own constitution and part of their organic law, by the same authority which enacted the bankrupt law? I think not. Nor does it seem to me that there is any necessary hardship in denying the remedies of the bankrupt law to the creditors of this corporation. There is no evidence that either this petitioning creditor, or any other creditor, has applied to the Comptroller to take possession and administer the assets. Additional force is also given to this consideration from the fact that in the very latest amendment to the Currency Act it is expressly provided that no attachment, injunction or execution shall issue against a bank until judgment is obtained.

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It is well known that in many of the States proceedings by attachment may be taken by a creditor in the first instance, and, as a matter of course, and in nearly or quite all the States, attachments can issue upon affidavits showing the existence of certain facts, while injunctions are almost universally issued before judgment or decree in equity cases when a case is made for one. And yet these corporations are, probably, for reasons of public policy, exempted from liability to all this class of summary proceedings. Here we have a restriction upon the powers of the bankrupt court, almost, if not wholly, incompatible with the jurisdiction. For of what use would it be to proceed in bankruptcy against a debtor, in a large number of cases, unless he could be enjoined and his property seized by process of the court? Before adjudication or judgment could be obtained, the property of the debtor might be wasted or spirited away, so that the adjudication would be barren of results.

I do not say that the prohibition to enjoin or attach property necessarily implies want of jurisdiction, but only that it goes far to show that it was never the intention of Congress to clothe a bankrupt court with jurisdiction as against these corporations.

I am, therefore, of the opinion that the rule to show cause should be denied, and the petition dismissed for want of jurisdiction.

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MAIN, Assignee, v. SECOND NATIONAL BANK OF CHICAGO.

(6 Bissell, 26.)

*Jurisdiction of Federal courts.*

A National bank cannot be sued in the Federal court, outside of the district where it is located. Service on the cashier when found within another district, does not give jurisdiction.\* *Manufacturers' National Bank v. Baack*, *post*.

The Practice Act of June 1, 1872, does not change this rule, nor enlarge the jurisdiction of the Federal courts.

(District Court, Western District of Wisconsin, March, 1874.)

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\* The act of Congress of March 3d, 1875, extends the jurisdiction of United States Circuit Courts to "controversies between citizens of different States," and, therefore, in such courts it is no longer necessary that one of the parties be a citizen of the State where the suit is brought. *Osgood v. Chicago, etc.*, *R. R. Co.*, 6 Biss. 330. — REP.



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**M**OTION to dismiss for want of jurisdiction, the defendant being a National bank, located and doing business in the city of Chicago, State of Illinois, and service having been had upon John P. McGregor, the cashier, who was found within the district.

*Tenneys, Flower & Abercrombie*, for the motion, cited *Crocker v. The Marine National Bank of New York*, 101 Mass. 240 ; *Cook v. State National Bank of Boston*, 50 Barb. 339.

*H. S. Orton and W. F. Vilas, contra.*

HOPKINS, J. In the argument filed in support of the motion it is claimed that a National bank cannot be sued in any court out of the judicial district where it is "located" or "established." I do not think the general banking law admits of such an interpretation. The eighth section of the act of June 3d, 1864 (13 U. S. Statutes at Large, 101), provides that such corporations "may sue and be sued in any court of law and equity as fully as natural persons."

I do not think the provision in the fifty-seventh section of the act restrictive of this general authority, but that it was intended rather to enlarge the operations of the twenty-first section of the Judiciary Act of 1789 (1 U. S. Statutes at Large, 78), and to confer upon such organizations the right to sue and be sued in the Federal courts, in the district where located, by a citizen of the same district ; and I fully concur with Judge BLATCHFORD'S views expressed in his opinion in the *Manufacturers' National Bank of Chicago v. Baack*, 8 Blatchford's C. C. Rep. 137,\* that the banks organized under the general banking act of Congress are to be deemed residents or inhabitants of the State and district where they are "located" and "established." The provisions of the act referred to by him are sufficient to warrant that conclusion, and if this were the only point I should have no hesitancy in overruling the motion.

But there is a question arising under the provision of the eleventh section of the Judiciary Act of 1789, which, as interpreted by numerous decisions of the Federal courts, seemed to me to constitute an insuperable objection to the plaintiff's right to prosecute this defendant in this court.

That section provides that "no civil suit shall be brought before

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\*Post.

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either of the courts (Circuit or District) against an inhabitant of the United States, by an original process, *in any other district than whereof he is an inhabitant, or in which he shall be found at the time of serving the writ.*" That the defendant was not an "inhabitant" of this district when this suit was commenced, is too plain for discussion. The remaining question is, was the defendant *found* "here at that time?"

The defendant, as before stated, was "located" at Chicago; that was its *habitation*; that does not move around with the person of its officers; the corporation is not migratory. It could not of its own will, and without authority of law, change its location to this State. Therefore, I must hold that this court has no jurisdiction over this defendant; that it was not "found" here within the meaning of that statute. In the case of *The Bank of Augusta v. Earle*, 13 Peters, 519, the court says, in speaking of locality of corporation: "It must dwell in the place of its creation; it cannot migrate to another sovereignty." This, it is true, was said of a State bank, but the same may with equal propriety be said of a National bank. They have a local habitation, an office, and place of business within a State or district as much as a State bank. Justice NELSON, in *Day v. Newark India Rubber Manufacturing Co.*, 1 Blatchford, 628, and in *Pomeroy v. New York & New Haven R. R. Co.*, 4 id. 120, examined this question very fully, and arrived at the conclusion in both cases, notwithstanding there was a statute of the State of New York authorizing service to be made upon officers of such foreign company within the State, which would give the State courts jurisdiction of the corporations, that the corporations were not "inhabitants" of the State, and were not "found" there because their officers and agents resided or came into that district; that the officers were not the corporations, and the corporations were not, therefore, found within the district.

This is a jurisdictional question, and "State laws can confer no authority on this court in the exercise of its jurisdiction, by the use of State process, to reach either person or property, which it could not reach within the meaning of the law creating it." *Toland v. Sprague*, 12 Pet. 328.

I do not think the Practice Act of June 1st, 1872 (17 U. S. Statutes at Large, 196), changes the rule. That relates to the practice and proceedings in suits against parties, who may be prosecuted in the Federal courts, but does not profess to enlarge their jurisdic-

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tion or to extend it over persons or cases not before within the cognizance of the court. As said in *Toland v. Sprague*, 12 Peters, 330, "the acts of Congress adopting the State process, adopt the form and mode of service only so far as the *persons* are rightfully within the *reach* of such process, and did not intend to enlarge the sphere of the jurisdiction of the Circuit Courts."

I think the same construction should be given to the act of 1872 above mentioned, and so construed, it does not relieve the case of the question of the *habitat* of this defendant being without the district, and not therefore subject to the process of this court.

The motion is therefore granted and this suit dismissed.

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IRONS V. THE MANUFACTURERS' NATIONAL BANK.

(6 Bissell, 301.)

*Insolvent National banks — When court may appoint a receiver.*

In cases not within the special provisions of the National Banking Act, a National bank may be proceeded against in the same manner as any other debtor or corporation.\*

A bill in equity by a judgment creditor of a National bank alleged that the judgment was for moneys deposited with the bank; that the bank had gone into voluntary liquidation; that it had withdrawn its bonds on deposit with the Treasurer of the United States; that the officers had fraudulently applied the funds of the bank to the payment of other persons than the complainant, and that there was no property subject to seizure on execution. *Held*, a proper case for the appointment of a receiver by the court.

(Circuit Court, Seventh Circuit, Northern District of Illinois.)

**B**ILL in equity filed in the Circuit Court for the Northern District of Illinois. The opinion states the case.

*Gardner & Schuyler*, for complainant.

*J. Hutchinson* and *Tenneys, Flower & Abercrombie*, for defendant.

**BLODGETT, J.** This is a creditor's bill, setting forth in substance that the complainant was a depositor in the Manufacturers'

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\* See *Wright v. Merchants' National Bank*, post.

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National Bank; that, at the time the bank closed its doors in October, 1873, he had a large sum deposited there; that the bank has since that time gone into voluntary liquidation, or pretended to do so; that it has withdrawn its bonds on deposit with the Treasurer of the United States, and has since that time in some manner, through the agency of various officers, converted its funds, under the pretexts of paying portions of some of its debts, and that in the meantime the complainant has brought suit against the bank, and recovered judgment in this court for the amount of his debt, something over \$12,000, issued his execution, and been unable to make anything. He charges that the officers of the bank have fraudulently applied the funds of the bank to the payment of other persons than himself; that they have made fraudulent settlements and dispositions of the property of the bank; and there is no property subject to seizure or execution which the complainant can obtain by proceeding at law, and asks for the discovery of whatever assets the bank or the officers of the bank may now have under their control belonging to the bank, and for the appointment of a receiver to take possession of these assets; and, also, that the adjustments or settlements which have been made by the officers of the bank, which are fraudulent, and in violation of the provisions of the banking law under which the defendant was organized, shall be set aside and held for naught, and the property equally distributed among all the creditors alike.

The bill does not show the fact, but an exhibit filed with the bill shows that within the last few months certain creditors of the bank have applied to the Comptroller of the Currency, under the provisions of the general banking law of the United States, asking that he appoint a receiver for this bank under the provisions of that law, and pursuant to it, for the purpose of winding up its affairs, and the Comptroller has responded to that request by the statement, in substance, that some time in the early part of January, 1874, the bank deposited government notes with the Treasurer to the amount of its circulation, and took up its bonds; and that the relations between the bank and the department of the Comptroller of Currency from that time on have ceased, and the Comptroller now has, or claims that he has, no authority to appoint a receiver; that he has no official notice of any protest of any of the circulating notes of the bank, and thinks that he has no authority to appoint a receiver.

The defendant files a general demurrer.

It would seem from an examination of the banking law, that the Comptroller of the Currency has no authority to appoint a receiver except in certain contingencies, such as the failure to make good a reserve, the failure to redeem circulating notes on demand, the failure to make good the capital stock, whenever the same becomes impaired, and the failure to meet certain other requirements of the banking law. Now, neither of these contingencies are charged in this bill to have occurred, and it is only in the case of such contingencies that the Comptroller acquires the right to appoint a receiver.

It is claimed on the part of the defendant, and has been very strenuously and ingeniously argued, that there is no power in any court to appoint a receiver for this bank, because the delegation of the power to the Comptroller of the Currency to appoint a receiver in certain contingencies to wind up the affairs of the bank excludes the authority of any other tribunal or person to appoint a receiver. I have carefully examined the banking law and the decisions of the Supreme Court, and those of various States made since this banking law took effect upon the various questions which have arisen, and do not find that this precise question has ever been made. But I can see nothing in the law itself, nor in the decisions of the courts upon the law, so far as they have gone, to exclude the idea that a corporation, created as this is under an act of Congress for certain specific purposes, does not come within the general provision of the law regulating the remedies of creditors as against this corporation as much as against any other corporation, except where there are specific provisions to meet those cases. For instance, a holder of the circulating notes of the bank, who had presented them for payment, and payment had been refused, would undoubtedly find this remedy within the special provisions of the banking law itself, because there is a specific provision meeting that case, and his remedy would undoubtedly be found in the action of the Comptroller of the Currency, but there are many cases like the one before us, where the bank may not have so violated any of the provisions of the banking law as to call for the appointment of a receiver by the Comptroller.

The allegations in this bill are very full that this bank was insolvent at the time it closed its doors, and has been ever since; that it failed to pay its debts; that a large amount of its debts are still unpaid, and the question is, what remedy have the creditors of this

bank if a court of equity cannot take on itself the administration of its affairs, where the banking law does not provide that it shall be done by the Comptroller of the Currency? It is true that in the case of *Kennedy v. Gibson*, 8 Wall. 498, the Supreme Court state that the provision of the banking law making the stockholders liable for the debts of the corporation to the amount of the stock held by them respectively, could not be enforced except under the action of the Comptroller through a receiver appointed by him. Whether that opinion will be found to entirely express the full meaning and intention of the Supreme Court, whenever they come to examine it in the light of future cases and facts which may be brought before it, is at least a matter of doubt. I do not feel sure that the Supreme Court will adhere to quite as broad a statement as is made in that case; but still they may. But even that does not oust the jurisdiction of a court of equity to take hold of whatever assets the bank may have aside from the personal liability of the stockholders, and administer those as it would the affairs of any insolvent corporation.

The law is well settled in this State and in the courts of the United States, that the proper remedy of a creditor against a corporation, when the assets are of such a nature that they cannot be levied upon and sold on execution, is by a proceeding in equity to marshal and distribute the assets. It is unnecessary to cite authorities upon that question. The law, I think, is as well settled as any branch of the law can be considered settled in this country.

The general banking law provides, by the fifty-second section, "That all transfers of the notes, bonds, bills of exchange, and other evidences of debt owing to any National banking association, or of deposits to its credit, or assignment of mortgages or sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion or other valuable things for its use, or for the use of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by this act, or with a view to the preference of one creditor to another, except in the payment of its circulating notes, shall be utterly null and void. U. S. Revised Statutes, 1874, § 5242.

Now by the fiftieth section of the banking law it is provided in substance that, after making provision for the payment, or rather

indemnification, of the government for the redemption of the circulating notes of a National bank, all the remainder of the proceeds of its assets shall be divided *pro rata* among its creditors, share and share alike, according to the amount due to each. And the section which I have just read makes void all payments and settlements which are made to one creditor, to the exclusion of other creditors, after the commission of an act of insolvency.

The allegations in this bill, which are confessed by the demurrer as true, show that the bank became insolvent, closed its doors, and, I think, was guilty of an act of insolvency within the meaning of the banking law — the organic act of incorporation.

It was urged by defendant's counsel that the only act of insolvency contemplated by this fifty-second section, was such an act of insolvency as authorized the Comptroller to appoint a receiver, that would be merely the failure to pay its circulating notes, and that a failure to pay a depositor, or its bills of exchange, or notes, or drafts, would not be an act of insolvency.

It can hardly be possible that Congress intended to give all the remedies in the banking law merely to the note-holder of these National banks, and leave depositors and general creditors entirely unprovided for. It must have been in the contemplation of Congress in the enactment of this act, that these National banks could receive deposits, because they are specially authorized to do so; that they would issue bills of exchange, and be otherwise liable to individuals and corporations, because there is express provision in various sections for payment of that class of indebtedness. And I think the term, "act of insolvency," mentioned in the fifty-second section, is clearly an act which would be an act of insolvency on the part of an individual banker; that is, the closing of the doors, refusing to pay depositors on demand, refusal to go on in the due course of business to transact its business as a bank, and discharge its liabilities to its creditors.

So that, upon the allegations in this bill, which are, as I said before, admitted to be true by the demurrer, it would seem that this bank has been making preferences in direct contravention of the provision of the banking law for a year past. How far a court of equity will deem it its duty to disturb these transactions, and require repayment from parties who have received payment from the officers of the bank in the course of liquidation of its affairs, is a matter for future consideration. But it certainly furnishes

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the ground for the intervention of a court of equity, it seems to me, when it is made to appear that a bank is going on and paying some creditors to the exclusion of others. It was the plain intention of the banking law that all creditors should share equally, and that no preference should be allowed in favor of one creditor as against others; that the United States government, as the guarantor of the circulating notes of the bank, is the only party that is entitled to any preference whatever; that all other creditors are to share alike. And, therefore, it would seem to follow that, if a bank is not in a condition to pay all its creditors, it can only pay them *pro rata*, — that it has no right to pay a part in full and have others unpaid.

Entertaining these views, and without taking longer time to explain my views upon the question, it is sufficient to say that I think a case is made by the bill for an appointment of a receiver.

J. D. Harvey was accordingly appointed receiver under a bond of \$100,000.

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VAN ANTWERP V. HULBURD.

(7 Blatchford, 426.)

*Deposits to secure circulation — Courts cannot control disposition of.*

The Circuit Court has no jurisdiction of a suit by a private person, to restrain, interfere with, or control the Treasurer of the United States, or the Comptroller of the Currency, in the discharge of their duties, in respect to bonds deposited with the Treasurer to secure the redemption of circulating notes of a National bank.

The provisions of sections 56 and 57 of the National Banking Act explained.

(Circuit Court, Second Circuit, June, 1877).

**A**CTION by Van Antwerp, as assignee of all the right, title and interest of the National Bank of Unadilla, in certain United States bonds deposited with the Treasurer of the United States, to secure the circulation of said bank against Hulburd, Comptroller of the Currency, Spinner, United States Treasurer, and Kingsley, receiver of said bank, to compel said Comptroller and Treasurer to disclose what disposition had been made of said bonds, and to obtain a decree directing said officers as to their duty and authority as to said bonds.



The said bonds were deposited by said bank in pursuance of the National Banking Act, for the purpose of procuring circulating notes and to secure their redemption. The bank, having gone into liquidation, assigned its interest in said bonds to the plaintiff.

WOODRUFF, J. The discovery and relief sought by the bill of complaint include an inquiry into, and a direct interference with the administration of the duties of the Comptroller of the Currency, and of the Treasurer of the United States, in respect of bonds deposited with such Treasurer, under the act of June 3d, 1864, to provide a National currency (13 U. S. Stat. at Large, 99), to secure the redemption of the circulating notes of a National bank. The bill assumes that this court has jurisdiction and authority to call those officers of the government to account for their official acts; to require them to state what, in their official capacity, they intend further to do; to restrain them by injunction from doing what is unjust or inequitable toward the plaintiff; and, by decree, to compel them to exercise their functions, in respect to such bonds, according to the law, as interpreted by the court, and to render justice and equity to the plaintiff.

The action is not brought against them as individuals, to restrain or redress a wrong, which, as private persons, they are doing or threaten to do, to the private rights of the plaintiff; and, if it were, their residence at Washington would forbid any attempt to give this court jurisdiction, by the service of process of *subpœna*, unless they should be found and served within this district. The act of Congress relating to both the Circuit and District Courts is quite explicit, that no civil suit shall be brought before either of said courts, against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ. Act of September 24th, 1789, § 11, 1 U. S. Stat. at Large, 78, 79.

It is not claimed that this court has, by virtue of the statutes creating the court, any jurisdiction of the officers of the executive department at Washington, to review or control their official acts, or to prescribe rules for the administration of their officers, on allegations that, in such administration, they have violated, or are about to violate, the private rights of an individual, even though such public officers should be found in this district and be here served with process. I say nothing of private wrongs, committed without color of official authority, or even

with such color, if outside of the jurisdiction of such officers, but it would be a most extraordinary claim, that the Secretary of State of the United States, or the Treasurer of the United States, is liable to be sued in any district or districts of the United States where he may at any time, or from time to time, be found, by any individual who conceives himself aggrieved by his official acts, or who alleges a title to be paid moneys which have been paid into the Treasury of the United States, or to receive other property held by the last-named officer, as such Treasurer. The power of the Circuit Court in the District of Columbia, and, incidentally, the question whether the Circuit Courts of the United States, severally, had power to issue writs of mandamus to compel an officer of the United States to perform a ministerial act, were fully discussed in *Kendall v. United States*, 12 Peters, 524, and the cases there cited affirm, that even that power has not been conferred on the Circuit Courts within the States. See *Marbury v. Madison*, 1 Cranch, 137; *McIntire v. Wood*, 7 id. 504; *McClung v. Silliman*, 6 Wheat. 598; *Reeside v. Walker*, 11 How. 272; *United States v. Guthrie*, 17 id. 284; *United States v. The Commissioners*, 5 Wall. 563.

The present suit proceeds in this court as a court of equity, against the defendant Hulburd, as Comptroller of the Currency, and against the defendant Spinner, as Treasurer of the United States. It arraigns their acts in that capacity, and seeks to control their official acts in the future. It being conceded that they are inhabitants of the city of Washington, and the statute plainly forbidding that a civil suit should be brought against them in this district by the service upon them in Washington of subpoena to answer, the jurisdiction of this court over them is claimed to be conferred, and, as an incident, the right to summon them to appear here, by the special provisions of the act to provide a National currency, before referred to, and the acts amending the same.

Deferring for the present the inquiry whether the proper mode of raising the question is by the plea which has been interposed on behalf of the Comptroller of the Currency and the Treasurer, I deem it proper to examine, first, the claim that the act, called, for convenience, the National Currency Act, confers the power and jurisdiction contended for. The sections of the act which are relied upon as conferring jurisdiction are the fifty-sixth and fifty-seventh.

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The fifty-sixth section provides that all suits and proceedings arising out of the provisions of the act, in which the United States, or its officers or agents, shall be parties, shall be conducted by the district attorneys of the several districts, under the direction and supervision of the Solicitor of the Treasury. Obviously, this section neither expressly, nor by implication, affects the jurisdiction of any court. It assumes, it is true, that suits may be brought and proceedings instituted which have their foundation in the provisions of the act, and that the United States, or its officers or agents, may be parties to such suits, and declares, and only declares, that such suits and proceedings shall be conducted by the district attorney. If this section is not solely applicable to actions and proceedings instituted by or in the name of the United States, or its officers or agents, and may, by a liberal construction, be held to impose upon the district attorney any duty of conducting the defense of suits and proceedings to which third parties may see fit to make the United States, or its officers or agents, parties defendant, still this language cannot be held to authorize the institution of such suits, or to give jurisdiction to a court not having, independently of this section, authority to entertain them.

The most obvious meaning, intent and effect of this section are, to impose upon the district attorneys the duty of conducting suits and proceedings which may be necessary to carry into full effect the provisions of the act, whether such suits are brought in the name of the United States or of the Comptroller of the Currency, or in the name of, or by, the receiver of a banking association, and in whatever courts such suits may be prosecuted. In general, the language employed, that such suits and proceedings "shall be conducted," imports prosecution, either civil or criminal, and not defense, and, in the other provisions of the act, there are numerous cases contemplated, to which such use of the language applies. But, as already, in substance, said, this section, whether it is confined to the prosecution, or includes also the defense, in nowise purports to indicate when, where, or for what purpose such suits or proceedings may be instituted, or to give them any legality or efficiency. Such legality and efficiency must be determined by other provisions of law. This section can no more be said to enlarge the jurisdiction of the Circuit Court of the United States either as to person or subject-matter, than it can to confer upon a State court a jurisdiction not possessed before the enactment.

How far is the plaintiff's position aided by the fifty-seventh section? That section enacts, that suits, actions and proceedings against any association under the act, may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases. It is not, and plainly it cannot be, claimed, that this affirmative enactment has any application to a suit against the Comptroller of the Currency or the Treasurer of the United States. Its terms are explicit, and the only suits, actions, or proceedings mentioned, are those against an association.

But there is a proviso to the fifty-seventh section, which, it is claimed, warrants the present suit. That proviso is in these terms: "Provided, however, that all proceedings to enjoin the Comptroller under this act shall be had in a circuit, district or territorial court of the United States, held in the district in which the association is located." It is argued that, because the present suit is brought to obtain an injunction, and appertains to the alleged rights of the plaintiff to bonds deposited in pursuance of the act, therefore, this proviso declares that this suit shall be brought in this or some other Federal court, and, by necessary implication, gives this court jurisdiction to summon the Comptroller, if not also the Treasurer of the United States, to appear therein and answer. This is a violent construction, I think, to the language of a proviso which is in the form of limitation, not of affirmative authorization, and has, I think, no such meaning.

What are the proceedings which may be had to enjoin the Comptroller "under this act?" No section provides for or refers to such a suit as the present. The eighth section declares, that the association itself shall have power to sue, and may be sued, complain and defend in any court of law and equity, as fully as natural persons. Under this section, if the association should prosecute a suit of any nature against any defendants whomsoever in any court, all the conditions of jurisdiction over the person of the defendant, and of the subject-matter, must be satisfied. The forty-sixth section relieves the association from the consequences of a refusal to redeem circulating notes, and of the protest of such notes, when the payment of such notes has been restrained by order of a "court or competent jurisdiction." This, of course, declares

nothing in respect to the nature or extent of the jurisdiction of any court. So, of that part of section 50 which makes the adjudication of a court of competent jurisdiction competent proof of claims against an association ; and, also, of section 58, which authorizes the recovery by the association of the penalty for mutilating its bills ; and, also, of the sections which declare counterfeiting the bills, or engraving plates for forging, a felony, or punishable by fine or imprisonment. Section 53 gives the circuit, district and territorial courts of the United States, jurisdiction of a suit brought by the Comptroller of the Currency, to obtain a judgment declaring a forfeiture of the franchises, etc., of an association, for violation of the provisions of the act.

Section 50, however, provides a case in which the Comptroller of the Currency may be enjoined, and prescribes the mode in which he may be called upon to show cause why he should not be enjoined. By that section, the Comptroller, on becoming satisfied that any association has refused to pay its circulating notes, and is in default, is authorized to appoint a receiver to take possession of the books, records and property of the association, collect the debts, etc., of the association, and sell its real and personal estate, and pay over all money made or realized, to the Treasurer of the United States, subject to the order of the Comptroller of the Currency. But the proviso to the section declares, that, if such association shall deny its default, it may apply to the nearest circuit, district, or territorial court of the United States, to enjoin further proceedings, and that such court, after citing the Comptroller of the Currency to show cause why further proceedings should not be enjoined, and after a decision or finding that such association is not in such default, shall make an order enjoining such Comptroller, and any receiver he may have appointed. This proviso contemplates a proceeding (not necessarily a formal suit or action, but a proceeding summary in form) instituted by the association, to continue its own existence, preserve its property, and avoid an *ex parte* receivership, ordered by the Comptroller to have effect and operate upon the association and its property in the very place where it is located. Such receiver might be appointed upon erroneous information or mistaken evidence, and considerations of convenience required that the association should have speedy and convenient means within its own district, and where the proofs must necessarily be, of rectifying a mistake and disproving the allegations upon which such

*ex parte* action of the Comptroller had proceeded. The proviso to the 57th section had one further object, which, I have no doubt, was its chief purpose, namely, to exclude any possible attempt to procure an injunction in any State court, to restrain the Comptroller in the discharge of his duty to appoint a receiver to close up the affairs of a bank that had become insolvent, or failed to comply with the provisions of the act. It was intended that, in that matter, State courts should have no jurisdiction.

I find no other circumstances in which proceedings to enjoin the Comptroller under the act are authorized by it. It is unnecessary, for the purposes of this case, to say, and I do not say, that no case can arise in any court in which, under the general principles of law and equity, the legality and effect of the acts of the Comptroller of the Currency, or of the Treasurer of the United States, may not be subjected to adjudication, nor that no case can exist in any court in which an injunction to stay the action of either of them may be obtained. What I mean to say is, that such a case is not provided for in the act in question, save as above stated and commented upon; and the court must seek its jurisdictional power over the subject-matter, and over the persons of the defendants, in some source other than the act referred to.

The conclusion necessarily follows, that the plaintiff is not, by the act of Congress relied upon, warranted in prosecuting an action in this court, as assignee of the bonds deposited with the Treasurer of the United States pursuant to the provisions of that act, to call such Treasurer and the Comptroller of the Currency to an account for their acts in their official character in relation thereto, and that this court has no jurisdiction to summon them, by writ of subpœna, to answer to the present bill of complaint.

It is, however, insisted that the Comptroller and Treasurer have, by their plea, submitted to the jurisdiction, and that their plea to the jurisdiction should, therefore, be overruled. If the only ground of objection to the jurisdiction of the court were the service of the subpœna out of the district, the consideration of the plaintiff's claim in this respect would be material. It is a familiar rule, often recognized in the Federal courts, that a party may waive his privilege, if he be relieved from liability to be sued in a particular court, and he may even waive the service of any process; and, by pleading or answering to the merits, he does submit to the jurisdiction. This, however, assumes that the court has jurisdic-

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tion of the controversy between the parties. But it is equally clear that exemption from liability to be sued in a particular court, and the objection that the process of the court is served out of the jurisdiction, are the proper subjects of a plea in abatement. I think the court might, in the present case, have granted a motion to set aside the proceeding as to the Comptroller and Treasurer on that sole ground ; but the defendants were not bound to abide the result of a mere motion. It was a matter which could be made to appear of record, and in a form which would make it subject to review. Such pleas at law and in equity are warranted on common law grounds, and in courts of general jurisdiction, as in England ; and the treatise and dicta cited to us do not deny this, but establish the contrary. Much more clearly is this true in a court whose jurisdiction is derived from statutes, in which the jurisdiction of the subject-matter and of persons, and the limitation of the modes of acquiring jurisdiction, are prescribed, and in terms prohibitory of any other. This will appear well recognized in decisions in the Federal courts, some of which will be presently referred to.

I am, therefore, clear, that, independently of the broader question which I have above discussed, if this case is to be disposed of on the plea that the process herein was served in the District of Columbia, and not in this jurisdiction, and upon defendants who were then inhabitants of that district, and not within this jurisdiction, the matter of the plea is sufficient to defeat the action. A party is not, by merely pleading to the jurisdiction, and alleging the facts which, if true, show want of jurisdiction, to be deemed to submit to the jurisdiction or waive its defect. So simple a proposition needs no authority. Every case, which countenances such a plea, affirms it. In *Halsey v. Hurd*, 6 McLean, 14, it was held, that a plea in abatement for want of service of process was not a waiver of process ; and that the plea might be abandoned, and a motion to quash the writ for defective service of process might be substituted.

If there be any embarrassment to a decision based solely upon the plea in this case, it arises, not from the matter of the plea, or the fact that the objection is raised by plea, but from the form of the plea, or the manner in which the plea is interposed. The elementary rule on that subject found in text writers, enforced by the courts in England, and countenanced, to

some extent, at least, in the practice of the Federal courts, is that pleas which are in abatement, and grounded upon personal privilege, or relief from liability to be sued in a particular court, must be put in *in propria persona*, and the appointment of attorney, solicitor or agent, by whom the plea is put in, is, *per se*, an appearance, an admission that the court has jurisdiction, and a submission thereto. See *Teese v. Phelps*, 1 McAllister, 48; *Teasdale v. The Rambler*, Bee's Rep. 9; the plea in *Dred Scott v. Sandford*, 19 How. 393. The rule is, in a high degree, technical, and it is not necessary, in the view that I have taken of the whole case, to affirm or enforce it here.

It was stated on the argument, that the present plea was, at the instance of the court, made a substitute for a motion to quash the proceeding or set aside the service of process on these defendants, in order that the matter might appear of record. My learned associate, before whom the motion was made, confirms this, and counsel insisted, on the argument, that they ought, if purely technical objections arise, to be at liberty to withdraw the plea and proceed upon their motion without being prejudiced by having pleaded; and my associate, who is familiar with what occurred in regard to the motion, thinks that should be permitted. Upon what precise reason does not appear, but the defendant in *Halsey v. Hurd* (above cited) was permitted to abandon his plea and move to quash the writ for defective service. If, therefore, I were of opinion that the plea put in by the solicitor was, in its present form, to be deemed a submission to the jurisdiction, I should acquiesce in the views expressed by my associate on the argument. But, entertaining the opinion which I do, that we have no jurisdiction between these parties to grant the relief sought, I deem it unnecessary to pursue the inquiry last above referred to any further. If I am right in my views, we cannot pronounce judgment between these parties upon the facts alleged in this bill of complaint; and, therefore, whether the particular plea before us is formal or informal, whether the matter were before us on motion or otherwise, it is our duty to dismiss the bill as to these defendants.

The general principle, that waiver of objection by the parties does not give jurisdiction of the cause or matter in controversy between them, would, probably, not be denied. But it has been acted upon so often in the Federal courts, and in cases in which the



subject of a plea to the jurisdiction in equity, as well as at law, is adverted to, that some may be profitably cited. In *Capron v. Van Noorden*, 2 Cranch, 126, it was held, that, on writ of error, a plaintiff might assign for error the want of jurisdiction in the court in which he himself brought the suit, and so take advantage of his own error in not showing his title to sue in that court. In *Jackson v. Ashton*, 8 Pet. 148, in equity, the court directed the dismissal of the bill because it did not affirmatively appear that the Circuit Court had jurisdiction, though it did not appear negatively that it had not. This was done by the court of its own motion. The counsel were anxious to have the case heard and decided on the merits, but Chief Justice MARSHALL stated the opinion of the court to be, that the bill must be dismissed. In *The State of Rhode Island v. The State of Massachusetts*, 12 Pet. 657, also in equity, the distinction above adverted to between cases in which a party may and must plead to the jurisdiction, is stated. It is there said: "Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them. \* \* \* An objection to jurisdiction on the ground of exemption from the process of the court in which the suit is brought, or the manner in which the defendant is brought into it, is waived by appearance and pleading to issue; but when the objection goes to the powers of the court over the parties, or the subject-matter, the defendant need not, for he cannot, give the plaintiff a better writ or bill." It is also there said, that the Supreme Court is one of limited powers and must be confined to cases and parties over which the Constitution and laws have authorized it to act, and that any proceeding without the limits prescribed is *coram non judice*, and its action is a nullity; and, in that case, the distinction between the courts of England and the Federal courts, in particulars important to this subject, is pointed out. See, also, *Toland v. Sprague*, 12 Peters, 300; *Voorhees v. Bank of the United States*, 10 id. 449, 473, 474. In *Smith v. Kernochen*, 7 How. 198, the right and duty to plead in abatement a personal privilege or want of jurisdiction of the person is held. The power and duty of the court to recognize their want of jurisdiction is concisely stated in *Tyler v. Hand*, 7 How. 573, citing *Dockminique v. Davenant*, 1 Salk. 220. If the matter or ground of objection to the jurisdiction be extrinsic, the defendant must plead it; if intrinsic, the court will act upon it on motion or notice it of them-

selves. In *Cutler v. Rae*, 7 How. 729, a libel in admiralty was prosecuted in the District Court of Massachusetts, the proofs were taken, a hearing was had and a decree was rendered for the libelants, which was affirmed in the Circuit Court. Chief Justice TANEY, in the Supreme Court, discusses the question of the jurisdiction of the District Court. He says: "It is true the counsel for the appellant has waived all objections on that score;" but "if the proceedings show a case which the District Court was not authorized to try, it is the duty of this court to take notice of the want of jurisdiction, without waiting for an objection from either party," and the decree was reversed on that distinct ground. In the case of *Dred Scott v. Sandford*, 19 How. 393, this subject is discussed by nearly all of the judges. There, a plea in abatement had been decided in favor of the plaintiff below, and it was insisted that he could not allege error in that decision. But it was held that the court could give no judgment for the plaintiff or for the defendant in a case in which it had not jurisdiction, no matter whether there were a plea in abatement or not. See pp. 402, 456, 458, 472 to 474, and numerous cases cited. Judge CURTIS (p. 567) says: "The course of the court is, where no motion is made by either party, on its own motion to reverse such a judgment for want of jurisdiction, not only in cases where it is shown, negatively, by a plea to the jurisdiction, that jurisdiction does not exist, but even where it does not appear affirmatively that it does exist. It acts upon the principle that the judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted." See *Piquignot v. Pennsylvania R. R. Co.*, 16 How. 104. For the same principles, see, also, *Striker v. Mott*, 6 Wend. 465; *Henry v. Cuyler*, 17 Johns. 469, 471; *Davis v. Packard*, 6 Wend. 327; *Jordan v. Dennis*, 7 Metc. 590, in State courts.

If, therefore, I am right in my opinion that this court has no jurisdiction to hear and determine, between this plaintiff and the Comptroller of the Currency and the Treasurer of the United States, the matters alleged in the bill of complaint, we can and must so hold, whether the particular plea put in by the defendants is good or not.

The bill, as to those defendants, should be dismissed.

HALL, J., concurred in the result of the foregoing opinion.

## VAN ANTWERP V. HULBURD.

(8 Blatchford, 282.)

*Title to bonds deposited to secure circulation.*

The plaintiff, a citizen of New York, claiming title by assignment to the bonds deposited with the Treasurer of the United States to secure the circulation of a National bank, filed a bill setting forth that the Comptroller of the Currency and the Treasurer refused to recognize his right to the bonds or their proceeds; that the Comptroller had appointed one K., a citizen of New York, receiver of the said bank, and intended to sell the said bonds and to pay the proceeds, after redeeming the circulation of the bank, to the general creditors of the bank, or to K. as such receiver, and that K. claimed as such receiver an interest adverse to the plaintiff in said bonds. The bill made the Comptroller, the Treasurer and K. parties defendant, and prayed a decree establishing the plaintiff's title and requiring the Comptroller and the Treasurer to deliver to the plaintiff the surplus of the bonds after redeeming the notes of the bank and annulling the appointment of K. as receiver. K. demurred to the bill for lack of equity. *Held*, that the demurrer must be sustained.

*Per* WOODRUFF, J. (1) The plaintiff could not question the validity of K.'s appointment as receiver; (2) that, as the court could not grant the relief as to the Comptroller and Treasurer, it could not as to K.; (3) that as under the National Banking Act the proceeds of the bonds could never come into the possession of K., he had no concern in the suit; (4) that the allegation that plaintiff was informed and believed that K. claimed an interest in the bond adverse to the plaintiff, was not sufficient to sustain the bill.

*Per* HALL, J. That the residuary interest of the bank in the bonds was a part of the assets of the bank to which K., as receiver, was entitled, unless the plaintiff's claim thereto was good, and that therefore the bill presented a question of property between plaintiff and K., but that as plaintiff and K. were residents of the same State the Circuit Court had not jurisdiction.

**A**CTION in equity before WOODRUFF and HALL, JJ., in the United States Circuit Court for the Northern District of New York.

*John H. Reynolds*, for plaintiff.

*Edwin W. Stoughton* and *William Dorsheimer* (district attorney), for defendant Kingsley.

WOODRUFF, J. The object of the present suit is to establish the title of the complainant to the United States bonds which were

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deposited with the Treasurer of the United States by the National Unadilla Bank, under the act of Congress, entitled An act to provide a National currency secured by a pledge of United States bonds, etc., approved June 3d, 1864 (13 U. S. Stat. at Large, 99), and the acts amendatory thereof, for the purpose of securing circulating notes. The complainant alleges that the bank determined to go into liquidation and close its affairs as a National bank, and, upon considerations stated, assigned to him all the right, title and interest of the bank in or to such bonds, and that he agreed to redeem the circulating notes ; that the Comptroller of the Currency and the Treasurer of the United States refuse to recognize his rights, have sold some of the bonds, have given notice of the redemption of such circulating notes, and have redeemed a portion thereof ; that, although the complainant has offered to deposit legal tender notes to the amount of such circulating notes, provided the bonds are returned to him, the officers mentioned refuse to deliver the bonds, or the proceeds thereof, to him ; that, shortly after such assignment to the complainant, the Comptroller of the Currency, acting under the said act of Congress, but without any legal ground therefor, the said bank not having done or omitted any act which warranted the same, assumed to appoint the defendant Kingsley receiver, and he accepted such appointment, and has taken possession of the assets and property of the bank ; that the Comptroller of the Currency has wrongfully sold some of the bonds, and the proceeds have been paid into the treasury of the United States, and he, in defiance of the complainant's rights, threatens to dispose of the residue, and, as the complainant is informed and believes, intends to retain the proceeds, and, after the redemption of all the circulating notes, to pay any surplus thence arising to the general creditors of the National Unadilla Bank, or to the said Kingsley, as the pretended receiver thereof ; and that, as the complainant is informed and believes, the said Kingsley claims, in his capacity of receiver, an interest adverse to the complainant in the bonds so deposited with the Treasurer for the redemption of the said circulating notes, and afterward assigned to the complainant. The bill, upon these facts and others, which it is unnecessary here to recite, bearing upon the administration of the defendants Hulburd and Spinner, in respect to the bonds, calls upon the latter to account for their administration, and to disclose what they have done, and what they intend to do, and asks a decree estab-

lishing the complainant's title, and that, after the redemption of the said circulating notes, or adequate provision made therefor, the officers last named be decreed to deliver the surplus of the bonds, and interest accrued or accruing thereon, to the complainant, and that it be decreed that the pretended appointment of Kingsley is null and void, with a prayer, also, for an injunction. To the bill of complaint the defendant Kingsley demurs generally, for that the complainant is not entitled to the relief prayed by the bill against the defendant.

The complainant shows no interest in the National Unadilla Bank, or its property or assets, of any description, except such title and interest in the bonds which that bank deposited with the Treasurer of the United States, to procure circulating notes, as he alleges he acquired by the assignment of those bonds to him by the bank. In so far as the receivership of the defendant Kingsley extends to any other property than those bonds, the complainant has no right to assail the appointment of such receiver as illegal or irregular. Whether the appointment is valid or void does not concern him. The sole object of the action is to assert the rights acquired by the assignment of those bonds to the complainant, and control the administration thereof. If, therefore, it appears, upon the bill of complaint, that this court has no jurisdiction of the officers of the government in whose possession and control the bonds, or the proceeds thereof, now are, and cannot, as to them, grant the relief which the complainant seeks, there would seem no ground for sustaining the suit as against the demurrant, unless he has done, or is about to do, some act which prevents or hinders the prosecution of the complainant's title before the government officers, or which prevents a recognition of those rights by them.

Upon a consideration of the subject growing out of the argument upon the bill of complaint and the plea interposed by the Comptroller of the Currency and the Treasurer of the United States, I have discussed the question at some length (*Van Antwerp v. Hulburd*, 7 Blatchf. C. C. R. 426\*), and have come to the conclusion, that this court in this action, and upon the admitted facts, has no jurisdiction as against those officers, to grant the relief sought, and that, as to them, the bill must be dismissed. So far as the views there expressed are material to the right of the com-

plainant to maintain the action at all, it is sufficient to refer to the opinion. But, in my judgment, the making of the defendant Kingsley a party to the suit was erroneous, upon grounds independent of the question there considered.

The defendant Kingsley has no custody, possession or control of the bonds in question, and, under no administration thereof, under the act of Congress, can they, or any proceeds thereof, ever come to his possession, custody, or control. He has no title nor interest in the bonds, or their proceeds, legal, equitable, or official, nor has he any duty to perform in respect thereto. His authority and his duty are founded upon section 50 of the act which, with sections 31 and 34, declares the case in which the Comptroller of the Currency may appoint a receiver. The character, powers and duties pertaining to such receivership are distinctly defined in section 50. He shall, under the direction of the Comptroller, "take possession of the books, records and assets, of every description, of such association, collect all debts, dues and claims belonging to such association, and, upon the order of a court of record, of competent jurisdiction, may sell or compound all bad or doubtful debts, and, on a like order, sell all the real and personal property of such association, on such terms as the court shall direct, and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders provided for by the 12th section of this act; and such receiver shall pay over all money so made to the Treasurer of the United States, subject to the order of the Comptroller of the Currency, and also make report to the Comptroller of the Currency of all his acts and proceedings." This is the beginning, scope and end of his duty and functions. It is the Comptroller who is to advertise for claims against the bank, and divide the money (after redeeming the circulating notes) to and among the creditors of the bank. Whatever power to sue may be implied as necessary to the performance of the duties of the receiver, and even if such receivership be held to involve the vesting in him *pro hac vice*, the legal title to the property and the debts, dues and claims which he is to collect or sell and convert into money, the receivership is limited, by the object of its creation, and the duties which it involves. For the full accomplishment of the object, and the due discharge of those duties, it may be conceded he has all necessary title, authority and power. But he cannot touch one of the bonds deposited with the Treasurer, or

a dollar of the proceeds thereof. They are committed to a different and a higher administration. All that he collects he is to pay to the Treasurer. The bonds and all proceeds thereof are already there. Practically, the receiver is the mere agent of the Comptroller, to bring the residue of the assets into the United States treasury. True, the language of the section is, that he shall take possession of the books, records and assets of every description, of such association. But this was not intended to displace the custody of the bonds held by the Treasurer, or the authority of the Comptroller of the Currency over such bonds. The administration of such bonds, and the mode and manner of their appropriation to the purposes for which they are held, are fully prescribed in other sections of the act, and these are to be had in view in the construction of the language last cited. The bonds, and the interest accrued thereon, and the proceeds thereof, are already, by the other express enactments, in the hands of the Treasurer; and it is absurd to say, that the title thereto, or some interest therein, was vested in the receiver, for the purpose of paying them over to the Treasurer. The bonds, if sold, are to be sold by the Comptroller of the Currency. The receiver has no office or duty to perform in respect thereto, and has no administration of the proceeds, when the Comptroller has made the sale and paid them over to the Treasurer. In short, the receiver has no concern in the subject-matter of this suit. He has no power to do any thing, and it is not alleged that he has done, or attempted to do, any thing, which impairs, in any manner, the alleged rights of the complainant, or hinders or prevents his obtaining the recognition of his rights, or any redress to which he is entitled, if those rights are not respected. But the complainant has inserted in his bill the statement, that he is informed and believes that the demurrant claims, in his capacity as such receiver, an interest, adverse to him, in the bonds so deposited with the Treasurer; and, inasmuch as a demurrer admits the facts stated, it is claimed that the fact and the admission thereof are sufficient ground for making the receiver a party defendant, and for requiring him to answer the bill.

I am, of course, aware that it is the common practice in the State of New York, in actions for the foreclosure of mortgages, and, perhaps, some others, to assign as a reason for making some defendants parties, that they claim some interest, as mortgagees, judgment creditors, or otherwise, in the premises. But this is a

part of a plan devised to save the expense of setting out their interest in detail, and is accompanied by provisions for giving them notice that no formal claim is made against them, and, on the one hand, relieving them from the necessity of answering, when, in fact, no interest adverse to the complainant exists, and from liability for costs; and, on the other, saving the plaintiff from the effect of a disclaimer. This practice has no bearing upon the present question.

It is not true, when the bill of complaint shows affirmatively, on its face, that the defendant has no interest in the matter, has neither a legal nor an equitable interest in the subject of the controversy, has no apparent documentary or other means of asserting a title or interest, not even color for a claim, when he has nothing which can be affected by the decision the court is required to make touching the rights of the complainant, or in short, where, upon the facts stated, it is clear that he stands wholly indifferent and unaffected, that the complainant may make him a party, and compel him to answer by merely stating that he is informed and believes that he claims an interest. This is not enough to set the power of a court of equity in motion. This does not show that a resort to a court of equity is necessary to protect the complainant against such claim, or that he is in any danger by reason thereof. In the present case, it not only is not shown that such claim is not an idle, harmless pretense, but the bill states a case in which the court is bound to say, as matter of law, it is utterly groundless, if not frivolous, and the complainant states no fact which warrants an appeal to a court of equity to protect him. It is not suggested in the bill that this alleged claim is used, or has been used, in any manner to the complainant's prejudice, or that it is in any way an obstacle to his obtaining possession of his bonds or their proceeds from the officers of the government. No facts are stated bringing this alleged claim within any analogy to suits to settle doubtful or conflicting claims, or to remove a cloud upon title, or to suits *quia timet*. A bill of interpleader resting upon such a naked allegation would not be entertained for a moment. The case in this respect stands upon the assumption that a complainant may bring into his controversy with one who holds and claims to hold the subject-matter in dispute, any defendant of whom he can say that he is informed and believes that such defendant claims an interest therein, and this, although as matter of



law in the case made, no such interest, legal or equitable, exists, and no fact is stated showing that such person is doing any thing whatever in hostility to, or to the prejudice of, the complainant's right. When to this is added, that, upon grounds more fully stated in reference to the other defendants who have pleaded to the bill, we have no jurisdiction to grant any relief to the complainant against the only defendants who are shown to have any possession or control over the subject of the controversy, the conclusion is inevitable that the demurrer of this defendant must be sustained.

HALL, J. The bill in this case sets forth the organization of the National Unadilla Bank, under the General Banking Act of the United States ; the subsequent deposit by the bank, with the Treasurer of the United States, of \$111,200, in United States registered bonds, as security for circulating notes to be issued under the authority of that act ; the receipt by the bank, from the Comptroller of the Currency, of \$100,000, in circulating notes ; and that such bonds were held exclusively for the redemption of such circulating notes. It also states, that, afterward and on the 8th of June, 1867, the said bank, by a vote of its directors and shareholders owning at least two-thirds of its capital stock, determined to go into liquidation as a National bank, and notified the Comptroller of the Currency thereof ; that all lawful proceedings were had and taken in due form to put all its affairs in liquidation ; that on the last-mentioned day the bank assigned to the complainant all its interest in the bonds so deposited ; that the complainant agreed to redeem all such circulating notes, and has always been ready to do so ; that the Treasurer of the United States and the Comptroller of the Currency were immediately notified of such assignment and its conditions ; that the complainant offered to deposit with the proper officer \$100,000 of the legal tender notes of the United States, to secure such circulating notes, on receiving the bonds so deposited, and such offer was refused ; that afterward, and in August, 1867, the defendant Hulburd, the Comptroller of the Currency, without any legal right or authority whatever (the non-existence of any fact or condition of things upon which such legal right or authority could be based being expressly alleged by the bill), assumed to appoint the defendant Kingsley as a receiver of the assets of said National Unadilla Bank ; that the Comptroller of the Currency has wrongfully sold

some of the said bonds, and has paid the proceeds into the Treasury of the United States, and intends to sell the remaining bonds and retain all the proceeds thereof, and, after the redemption of the circulating notes of the bank, to pay any surplus thence arising to the general creditors of the bank, or to the defendant Kingsley, as the pretended receiver thereof; that Kingsley thereafter took possession of all the assets of the bank as such receiver, and that the complainant is informed and believes that the said Kingsley, in his capacity as such receiver, claims an interest in said bonds so deposited, adverse to the complainant. It is expressly averred, that the National Unadilla Bank has ceased to exist as a National bank, and had not failed to redeem its notes, and had committed no act authorizing the Comptroller of the Currency to appoint a receiver, and that he and the Treasurer had no official duty to perform in respect to such securities, except to hold them as security for the redemption of the circulating notes of such National bank, or dispose of them for the payment and redemption of such notes in the manner provided for in said General Banking Act, and that such securities had a market value of about eight per cent over their par value. To this bill the defendant Kingsley demurred and alleged that the bill shows that the plaintiff is not entitled to the relief prayed.

The bill contains sundry other allegations, but it is unnecessary to state its allegations more fully, as the ground upon which the validity of the demurrer was based is well set forth in the opinion of my learned brother (to whose conclusion in this respect I am unable to assent), in the statements that the defendant Kingsley has no custody, possession, or control of the bonds in question, and that, under no administration thereof, under the act of Congress, can they, or any proceeds thereof, ever come to his possession, custody or control; and that he has no title or interest in the bonds, or their proceeds, legal, equitable or official, or any duty to perform in respect thereto.

In one sense, and upon the allegations of the plaintiff's bill, it is certainly true, that the defendant Kingsley has no interest in the bonds deposited by the bank; but its truth, in that sense, furnishes no ground for the demurrer. It is true because, upon the allegations of the bill, the plaintiff's right to the bonds, or their proceeds, after the payment of \$100,000, of the circulating notes of the bank, is perfect, and necessarily excludes all right of any

representative of the bank ; but it is not in that sense that the statements of my learned brother are intended to be understood. It is quite certain, from other portions of his opinion, that he bases such statements upon the conclusion that the defendant Kingsley would have had no right to the possession, custody, or control of such bonds, or any portion of their proceeds, after the full redemption of all the circulating notes of the bank, even if there had been no assignment of the interest of the bank in the bonds so deposited. It is true that there is some language in his opinion which might indicate that this was not the sole ground upon which the statements referred to are based ; but such language must be considered in connection with the general law of pleading, and it is not likely that it was intended to be based upon the fact, that the bill showed that the defendant Kingsley had no interest in the subject-matter of the suit, inasmuch as it showed that the plaintiff's title to the residue of the bonds, or their proceeds, after the circulating notes of the bank were redeemed, was perfect and unquestionable, as against the bank and its representative. On that ground, many, if not most, bills would be demurrable ; for it is, ordinarily, the very object and purpose of a bill in equity to show that the defendant against whom relief is sought has no paramount or other right to the subject of the controversy, and that the plaintiff's right to relief is unquestionable. Surely, this is no ground for a demurrer to a bill which shows an interest in the defendant if the plaintiff's claims are not sustained, and also shows, by direct and express averment, that such defendant claims a right adverse to that asserted by the plaintiff.

In this view of the case, it is proper to consider the provisions of the General Banking Act under which such securities were deposited, and also the provisions of the same act under which the Comptroller of the Currency assumed to appoint the defendant Kingsley as such receiver.

These bonds were deposited by the bank with the Treasurer of the United States, under the 16th, 26th, and other sections of the General Banking Act of June 3d, 1864 (13 U. S. Stat. at Large, 99), and, under the 26th section, they were to be held exclusively for the purpose of securing the circulating notes of the bank. By the 16th section, the bank is authorized to return its circulating notes to the Comptroller and take up the securities deposited therefor, in the proportions and to the extent described ; and, by the

26th section, the bank is entitled to a power of attorney to receive and appropriate to its own use the interest on these securities, until it shall have failed to redeem its circulating notes. These and other provisions of the act show conclusively that the bank, before its assignment to the plaintiff, had the equitable, if not the legal, interest, in these securities, subject only to the power and right of the proper officers of the Government to dispose of them, or so much of them as might be necessary, in the manner prescribed by the act, for the redemption of the circulating notes of the bank ; and this residuary interest the bank might, in the ordinary course of its business before the appointment of any receiver, assign for a proper consideration. This residuary interest, if not assigned by the bank before the appointment of a receiver, is necessarily a part of the assets of the bank ; and the 50th section of the act, under the provisions of which the defendant Kingsley acts as receiver, after authorizing the appointment of a receiver, under certain circumstances, provides, that he "shall take possession of the books, records, and assets of every description .of such association" (bank), "collect all debts, dues, and claims belonging to such association," etc. The same section also provides that the receiver shall pay the moneys made or realized by him out of the assets of the bank, "to the Treasurer of the United States, subject to the order of the Comptroller of the Currency," and that the Comptroller (after paying preferred claims, etc.), "shall make a ratable dividend of the money so paid over to him by such receiver, on all such claims as may have been proved to his satisfaction or adjudicated in a court of competent jurisdiction." There is nowhere in the act any other provision for the division or disposition of the moneys arising out of the residuary interest of the bank in bonds pledged as security for its circulating notes ; and it is only of the moneys paid over by the receiver, under this 50th section, that the Comptroller is authorized to make a dividend. There is no provision in the act authorizing the Comptroller or Treasurer to dispose of the residue or surplus proceeds of such bonds in payment of the debts of the bank, or otherwise, and, therefore, until the moneys arising therefrom are legally transferred from the Treasurer to the receiver, they are in the possession of the Treasurer, as the officer of the United States, as the holder of a pledge for the bank ; and the Comptroller has no power to make any distribution thereof, in payment of the general debts of the bank,

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until they have passed into the hands of the receiver and have been by him paid over to the Treasurer, subject to the order of the Comptroller of the Currency. The residuary interest of the bank in the securities thus pledged is a part of the assets of the bank, the same as though such securities had been pledged to a private person, as collateral security for the payment of an ordinary commercial debt ; and a properly appointed receiver, as the representative of the bank, has the right to demand and receive the property so pledged, as an asset of the bank, in the one case the same as in the other.

It seems very clear, then, that upon the case made by the bill, the right to this residuary interest is in the plaintiff ; and that, if the plaintiff's right under the assignment set forth is not established, no one but the defendant Kingsley, as such receiver (if he has been legally appointed and become vested with the right of the bank), has a right to the same. There is, therefore, a question of property between these parties, upon the claim made by the defendant, as expressly charged in the bill ; and the demurrer, consequently, admits, that the defendant, as such receiver, claims an interest in such securities adverse to the plaintiff. These adverse claims to this residuary interest may, therefore, be properly litigated, in this suit, between the plaintiff and Kingsley, as the only party who appears to claim a legal pecuniary interest adverse to the plaintiff's alleged right, and as the only party who can now have a legal standing in court to represent that interest and litigate the claims of the plaintiff, if the receiver was properly appointed. It does not appear that any one but the defendant Kingsley asserts any claim to such residuary interest in the subject in controversy, as against the plaintiff, and he claims, as such receiver, and as the representative or legal assignee or successor of the bank, for the purpose of paying the same to the general creditors of the bank ; and, as a decree in this case would determine the question of right as between these two parties, the demurrer should, in my judgment, be overruled, in case this court has jurisdiction of this suit, as between the plaintiff and the defendant Kingsley.

I do not remember that this question of jurisdiction was raised upon the hearing, and my minutes of the argument do not show that it was discussed by the counsel, or that any act of Congress conferring jurisdiction in such a case as this, when the plaintiff

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and defendant are alleged to be citizens and residents of the same State, was cited. And I am not aware that any such act is in force. For that reason I concur in the conclusion that the demurrer must be allowed.

## CADLE v. TRACY.

(11 Blatchford, 101.)

*Actions against National banks — Where to be brought — Jurisdiction of State courts — Estoppel.*

A creditor, resident in Kentucky, of a National bank located in Alabama, brought suit against the bank in the Supreme Court of New York, and attached property in New York alleged to belong to such bank. *Held*, that the State court had no jurisdiction under the provisions of section 57 of the act of 1864 (13 Stat. at Large, 116).

A National bank can be sued only in the courts designated in section 57 of said act, *i. e.*, "in any circuit, district or territorial court of the United States held within the district in which said association may be established, or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases." \*

An action having been commenced in a State court against an insolvent National bank, the receiver of the bank appointed by the Comptroller of the Currency was, on his own application, substituted as defendant. *Held*, that the receiver was not thereby estopped from questioning the jurisdiction of the court.

(Circuit Court, Second Circuit, Southern District of New York.)

**B**LATCHFORD, J. So far as the bill of Cadle, the plaintiff herein, and the answer of the defendant Tracy, raise issues between those two parties, such issues, and the subject-matter of

\* See *Manufacturers' National Bank v. Baack*, ante, p. 161; *Main v. Second National Bank*, ante, p. 200; *Bank of Bethel v. Pahquioque Bank*, ante, p. 77.

Section 51 of the act of 1864 provided: "That suits, actions and proceedings against any association under the act may be had in any circuit, district or territorial court, held within the district in which such association may be established, or in any State, county or municipal court, in the county or city in which said association is located, having jurisdiction in similar cases, provided, however, that all proceedings to enjoin the Comptroller under this act, shall be had in the circuit, district or territorial court of the United States, held in the district in which the association is located."

In *Cook v. State National Bank*, 52 N. Y. 96, hereinafter reported, the Court

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the controversy created thereby, are the same as in the suit in the Supreme Court of New York, between those two parties.

In the bill in this suit, the plaintiff, after setting forth his title as receiver of the First National Bank of Selma, in Alabama, under the act of Congress of June 3d, 1864 (13 U. S. Stat. at Large, 99), avers, that the Selma Bank became insolvent as early as the 16th of April, 1867; that, when it became insolvent, part of its assets, amounting to \$6,972.88, in currency, and \$8,409.96 in gold coin, were in the possession of the Ocean National Bank of the city of New York; that the Ocean Bank still has such assets; that the defendant Tracy claims a part of them under an attachment issued in his favor, as a creditor of the Selma Bank, by the Supreme Court of New York, on the 29th of April, 1867; that the Selma Bank, on and before the 12th of April, 1867, was indebted to the United States in more than \$250,000; that the United States recovered a judgment for that amount against said bank, in the District Court of the United States, for the Southern District of New York, on the 20th of August, 1867; and that the United States have a prior lien on the said assets in the hands of the Ocean Bank. The prayer of the bill is, that Tracy may be enjoined from proceeding further on his attachment, or on any judgment in the suit in which said attachment was issued, and that the moneys in the hands of the Ocean Bank may be paid to the plaintiff.

The answer of the defendant Tracy, in this suit, admits, that the Selma Bank became insolvent on the 16th of April, 1867; that the Ocean Bank had in its possession the assets referred to; and that the United States recovered the judgment above mentioned. It then avers, that the Selma Bank, on the 15th of April, 1867, gave to the defendant Tracy, eight drafts drawn by it, on the Ocean Bank, all dated that day, for \$8,500 in all, payable to his

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of Appeals of New York held that the foregoing section, except the proviso, was *permissive* only, and that an action would lie in a State court of New York, against a National bank located in Boston.

On the other hand, in *Crocker v. The Marine National Bank*, *post*, the Supreme Court of Massachusetts held otherwise, and that a suit would not lie in a Massachusetts court against a National bank located in New York.

The Revised Statutes of the United States give to the District Courts jurisdiction "of all suits by or against any association established under any law providing for National banking associations, within the district for which the court is held." Section 563. Section 629 gives to the Circuit Courts jurisdiction "by or against any banking association established in the district for which the court is held under any law providing for National banking associations."

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order; that payment of the drafts was demanded of, and refused by the Ocean Bank, on the 27th of April, 1867; that, on the same day, advice thereof was duly given to the Selma Bank; that, on the 29th of April, 1867, an action was commenced on the drafts by Tracy, against the Selma Bank, in the Supreme Court of New York, by publication of a summons and by attachment; that on the same day the attachment was duly levied by the sheriff on the money in the Ocean Bank; that on the 13th of May, 1868, an order was made in that suit on the application of Cadle, whereby he, as receiver of the Selma Bank, was substituted as defendant in that suit, with the like force and effect as if that suit were continued in the name of the Selma Bank; that thereupon Cadle interposed an answer in that suit; that the suit was tried, and Tracy recovered judgment in it on the 9th of February, 1871, for \$11,573.24, to be levied and collected of the moneys attached, being the moneys in the Ocean Bank; that Cadle appealed from the judgment, and the General Term of the Supreme Court affirmed it; that both of the judgments remain in force; that thereby Tracy has a lien on said moneys, which is paramount to the claim of Cadle, and the amount of the judgments ought first to be paid out of said moneys, and the rights of Cadle extend only to the surplus of said moneys; that Cadle, by his answer, in the suit in the State court, claimed, as his defense, that the State court had no jurisdiction either over him, as an officer, or over the Selma Bank, or over the subject of the action; that it was his duty as receiver of that bank, to make such disposition of its assets as was required by the act before mentioned; and that, to permit service of process in that suit, by attachment, to be effective, or to make him amenable to that suit, would be contrary to law and to said act; that said Cadle, by said answer, also set up the said indebtedness of the Selma Bank to the United States, and the said judgment in favor of the United States, and claimed that the United States had a prior lien on said moneys; that, on the trial of that suit, the State court found, as conclusions of law, that it acquired jurisdiction over the Selma Bank and over Cadle, to the extent of the funds attached; that it had jurisdiction over the subject of the action; that the cause of action arose in the State of New York; that the said act contained no provision operating to defeat the attachment in that suit; that the United States had not acquired any prior lien on the funds, and that Tracy was entitled to judg-



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ment against Cadle, as such receiver, for \$10,766.48 and costs, to be levied and collected of the attached funds; that judgment was rendered therefor, and affirmed as above stated; that the bill in this suit is for the same matters, and based on the same grounds as were set up by Cadle in the said suit in the State court; that all the claims and rights which are asserted by Cadle in said bill, in reference to the moneys in the Ocean Bank, were asserted and litigated in the said suit in the State court, and were decided adversely to Cadle, and in favor of Tracy, by said judgment; and that the validity of the claim of Tracy, by virtue of the attachment and judgments in the said suit in the State court, and the right of Tracy to have the same paid out of said moneys, was finally and judicially determined by the State court in that suit. The answer then states that Tracy sets up the said judgments, and prays the same benefit of them, and of the matters alleged in his answer, as if he had specially pleaded the same in bar to the bill, and as an estoppel to the plaintiff in this suit.

The record of the proceedings in the suit in the State court is in evidence. On the 23d of April, 1868, an order was made in that suit, continuing it in the name of the Selma Bank, under the provisions of the act of the Legislature of New York, of April 26th, 1832 (Sess. Laws of 1832, ch. 295, § 4), until a final judgment should be had, which should have the like effect on the rights of the parties as if the corporation had not been dissolved, such order to have effect as of the 1st of June, 1867. On the 13th of May, 1868, on a motion made in that behalf by Cadle, as receiver, an order was made in that suit that Cadle, as receiver, be substituted as defendant therein, with the like force and effect as if the action were continued in the name of the Selma Bank.

In July, 1868, Cadle, as receiver, put in his answer in the suit in the State court. That answer contained the averments and raised the defense, which the answer of Tracy in this suit states it contained and raised. On the trial the State court found to the effect set forth in said answer of Tracy, and the judgment referred to was rendered, and appealed from by Cadle, and affirmed.

It follows, from the foregoing facts, that, if the State court had jurisdiction to render the judgment which it did render, between Tracy and Cadle, this court cannot in this suit re-examine the matters settled by that judgment, as between Tracy and Cadle.

The summons and the complaint in the suit in the State court

asked for judgment against the Selma Bank for the amount of the drafts, and the judgment rendered was a judgment that Tracy recover of Cadle, as receiver of the Selma Bank, \$10,766.48, and \$806.76 costs, being in all \$11,573.24, "to be levied and collected of the moneys and property whereon an attachment has been heretofore levied in this action." The judgment was, in form, one *in personam* against Cadle, as receiver of the Selma Bank, to be collected out of the attached property.

The Code of Procedure of New York, § 227, provides that in an action arising on contract, for the recovery of money only "against a corporation created by or under the laws of any other State, government or country," the plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of such corporation attached, in the manner thereafter prescribed, as a security for the satisfaction of such judgment as the plaintiff may recover; and that for the purposes of that section an action shall be deemed commenced when the summons is issued, provided it be personally served, or publication thereof be commenced within thirty days. The same Code, § 427, provides that an action "against a corporation created by or under the laws of any other State, government or country," may be brought in the Supreme Court of New York, by a plaintiff not a resident of the State of New York, "when the cause of action shall have arisen, or the subject of the action shall be situated, within the State."

The record of the suit in the State court shows, that Tracy resided in Kentucky when the suit was brought; that the Selma Bank was a corporation created under the act before mentioned; and that the suit was commenced by attachment and publication of the summons.

The jurisdiction of the State court is attacked, on the ground that such court could not acquire any jurisdiction, at least *in invitum*, of a suit against a corporation created under the act before mentioned; and on the further ground that the cause of action, in the suit in that court, did not arise within the State of New York.

It is provided by section 8 of the act before mentioned, under which the Selma Bank was created, that every association, formed pursuant to the provisions of the act, shall be a body corporate, and, by its name, may "sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons." I have here-

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tofore held (*The Manufacturers' National Bank of Chicago v. Baack*, 8 Blatch. C. C. 137), that the effect of this provision is, not to give to the corporation the capacity to be sued in every court within the United States, whether State or Federal, or to give to every such court jurisdiction over every suit which may be brought in it, wherein the corporation is defendant; that its only proper effect, as regards the corporation, when a defendant, is, to provide, that, when the corporation has been brought, as a suitor, into a court which has jurisdiction of the suit, it shall stand in court, in all respects, in the same position as regards its own rights, or the rights of others against it, as to the subject-matter of the suit, in which a natural person who is a suitor in such court can stand; and that the provision leaves the question as to the proper court in which the suit is to be brought in respect of jurisdiction to be determined by other provisions of law. There can be no doubt, I think, that the provision of section 427 of the Code of New York, before cited, gives to the Supreme Court of New York jurisdiction, so far as that provision is concerned, over a suit against a National bank located in another State, as a corporation created under the laws of another government, in favor of a plaintiff not a resident of the State of New York, in the cases provided for by that section. Such has been, in effect, the construction of the statute of New York by the courts of that State.

In *Bowen v. The First National Bank of Medina*, 34 How. Pr. 408, it was held by the General Term of the Supreme Court of New York, for the Eighth District, construing sections 227 and 427 of the Code, that the Supreme Court of New York had jurisdiction, under those sections, of an action against a National bank located in that State, and also jurisdiction to proceed, by attachment, against the property of such bank, in an action against it, arising on contract, for the recovery of money only, on the ground that, within the language of each of these sections, the bank was a corporation created by or under the laws of another government. In *Cooke v. The State National Bank of Boston*, 50 Barb. S. C. 339, it was held by the Special Term of the Supreme Court of New York in the First District, that the statutes of New York gave to the Supreme Court of New York jurisdiction of an action against a National bank located in Massachusetts, and, also, jurisdiction to proceed, by attachment, against the property of such bank, the decision being placed on the ground, that under the provisions of

the Code of New York, a National bank is a corporation created under the laws of another government, at least where it is located in another State, and is foreign both in its origin and its location. Then we have the fact of the decision of the Supreme Court of New York, Special Term and General Term, in the suit brought by Tracy against the Selma Bank, which resulted in the judgment against Cadle. No decision of any State court of New York is cited, giving any other interpretation to the statutes of New York under which the suit of Tracy was brought, and the attachment was issued; and, although the point does not appear to have been passed upon by the highest court in New York, yet, under the settled doctrine, that a Federal court will follow the decisions of the State tribunals on all questions depending upon the local statute laws of the States, it must be held, that, so far as the statutes of New York are concerned, the Supreme Court of New York had jurisdiction to entertain the suit of Tracy against the Selma Bank, and to proceed against the property of such bank by attachment, in such suit. But it is contended that the jurisdiction of the Supreme Court of New York over that suit is restricted and taken away by the 57th section of the said act of June 3d, 1864, which provides, "that suits, actions and proceedings against any association under this act, may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established, or in any State, county, municipal court in the county or city in which said association is located, having jurisdiction in similar cases, provided, however, that all proceedings to enjoin the Comptroller under this act, shall be had in a circuit, district, or territorial court of the United States, held in the district in which the association is located."

It is urged, on the part of Tracy, that the expression, "under this act," in the 57th section, where it occurs first, "suits, actions and proceedings against any association under this act," has the same meaning which it must necessarily have where it occurs the second time in that section, "proceedings to enjoin the Comptroller under this act," and that it refers, in both cases, solely to proceedings provided for by the act; that, where it first occurs, it refers to proceedings which seek to enforce the various obligations imposed upon the corporation and its officers, to guard against the mal-administration of the affairs of the corporation, and to collect

the penalties and determine the forfeitures established by the act ; that such proceedings are, under section 41, suits against the association to collect taxes from it, and to collect penalties for not making returns, and, under section 53, suits to forfeit the franchise of the association and dissolve it; that such proceedings must, from the general principles applicable to corporations, be had in courts established in the place where the corporation is located ; and that the words, "under this act," in the 57th section, are only equivalent to the words, "arising out of the provisions of this act," used in the 56th section, in the enactment, that "all suits and proceedings arising out of the provisions of this act, in which the United States or its officers or agents shall be parties, shall be conducted by the district attorneys of the several districts, under the direction and supervision of the Solicitor of the Treasury."

There is much force, at first, in this view, and it derives some strength from the language of the provision of the 8th section, before cited, and also from a consideration of the language of the 11th and 59th sections of the prior Banking Act of February 25th, 1863 (12 U. S. Stat. at Large, 665), which latter act was repealed by the 62d section of the act of June 3d, 1864.

The 11th section of the act of 1863 contained the same provision found in the 8th section of the act of 1864, that the association, by its corporate name, could "sue and be sued, complain and defend, in any court of law or equity, as fully as natural persons." The 59th section of the act of 1863 provided that "suits, actions, and proceedings, by and against any association under this act, may be had in any circuit, district or territorial court of the United States, held within the district in which such association may be established." Considering the 11th section of the act of 1863 by itself, it is not unreasonable to say, that that section enacted that the corporation could sue and be sued, in any court which, by its constitution and practice, and by the actual course of proceeding in the particular suit, would have jurisdiction of the subject-matter of the suit and of the parties thereto ; and that this was a provision in respect to suits which might arise out of the dealings of the corporation with other persons, in the way of its business, in such dealings, by way of contract or otherwise, as a natural person might have in his relations with other persons. Then came the question as to providing for suits and proceedings arising out of the provisions of the act. So the 55th section of the

act of 1863 was enacted, in the same words, before cited, as the 56th section of the act of 1864. So, also, the 59th section of the act of 1863 was enacted in the words before cited. That section, in terms, provides for suits "by and against any association under this act," while the 57th section of the act of 1864 provides only for suits "against any association under this act." The 29th section of the act of 1863 provided, as does the 50th section of the act of 1864, for a suit by an association, in the nearest circuit, district, or territorial court of the United States, on the denial of its failure to redeem its circulating notes, to enjoin the Comptroller of the Currency from proceeding to wind it up. So, too, the 19th section of the act of 1863 made the association liable to a suit for a penalty for not making a return, and the 50th section of that act made it liable to a suit to forfeit its franchise and dissolve it.

In the case of *The Bank of the United States v. Deveaux*, 5 Cranch, 61, the question arose whether the Bank of the United States, incorporated by the United States in 1791, was competent to sue in a Circuit Court of the United States. The act of incorporation conferred on the corporation in terms, act of February 25th, 1791 (1 U. S. Stat. at Large, 192, § 3), the capacity to "sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record or any other place whatsoever." But the court held that this provision did not enlarge the jurisdiction of any particular court, but only gave "a capacity to the corporation to appear, as a corporation, in any court which would, by law, have cognizance of the cause if brought by individuals;" that if that clause gave jurisdiction to the Federal courts, it gave it equally to all courts having original jurisdiction; and that a general right to sue in all courts and in any court did not imply a right to sue in the courts of the United States, unless such right was expressed. The court based this view, in part, on the fact that the act in one part of it authorized a suit to be brought against the directors individually, for creating an excess of debt in any court of record, Federal or State. The conclusion was that no right was conferred on the bank, by its act of incorporation, to sue in the Federal courts.

In enacting the Banking Act of 1863, it was necessary, then, it is contended, for Congress, if it desired to give jurisdiction of proceedings under that act to the Federal courts, to so enact in terms.

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The 29th section of the act of 1863 (in terms such as are found re-enacted in the 50th section of the act of 1864), provided that the association might "apply to the nearest circuit, district or territorial court of the United States," to enjoin the Comptroller of the Currency, and the 50th section of the act of 1863 (in terms such as are found re-enacted in the 53d section of the act of 1864, except that the latter act requires the suit to be brought by the Comptroller of the Currency), provided that the franchise of the association might be adjudged to be forfeited, and it might be declared to be dissolved "by a proper circuit, district or territorial court of the United States." But the terms "the nearest" court and "the proper" court, were entirely vague. Therefore, it is said, the 59th section of the act of 1863 was enacted, giving jurisdiction to particular Federal courts, of the suits by the association provided for by the 29th section of that act, and of the suits against the association, provided for by the 19th and 50th sections of that act.

Passing, now, to the act of 1864, the same reasons, it is urged, existed for Congress to so enact in terms, if it desired to give jurisdiction to the Federal courts of proceedings under that act. Hence, it is said, the 57th section of the act of 1864 was enacted, giving jurisdiction to particular Federal courts of the suits against the association, provided for by the 41st and 53d sections of that act.

The difficulty in giving such a restricted meaning to the words, "under this act," in the first part of the 57th section of the act of 1864, as will confine their meaning to proceedings arising out of the provisions of that act is, that the provision of that section allowing such proceedings to be taken "in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases," can have no scope for operation, except in respect to a suit under the 41st section of the act of 1864, against the association, to collect a penalty for not making a return—a penalty to the United States, and one which it would not be likely to sue for in any court but a court of the United States, and one which it could sue for in such court.

The 53d section of the act of 1864 requires, that a forfeiture shall be adjudged by a court of the United States, and the suit by the association, to enjoin the Comptroller of the Currency (even if the word "against," in the 59th section of that act, is, under the

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intimation in *Kennedy v. Gibson*, 8 Wall. 498, 506, to be read, "by and against," as in the 59th section of the act of 1863), must, under the 50th and 57th sections of the act of 1864, be brought in a court of the United States.

In addition to the fact, that, on this restricted meaning of the words, "under this act," there is, practically, no field for the operation of the jurisdiction given to the State courts by the 57th section of the act of 1864, it is to be observed, that Congress was creating corporations which were to have business connections with vast numbers of persons, and were expected to take the place of State institutions of a like character. It was, therefore, to be expected, that Congress, in clothing such corporations with all their functions, would prescribe in what tribunals, not only proceedings against them, taken under the act, but all suits against them, should be brought. As the corporations are created by Congress suits against such corporations are cases arising under a law of the United States, within the meaning of the Constitution (art. 3, § 2), and it was competent for Congress to confer on the Federal courts jurisdiction over such suits. *Osborn v. The Bank of the United States*, 9 Wheat. 738. It was, also, competent for Congress to make jurisdiction of such suits exclusive in the Federal courts. *Martin v. Hunter's Lessee*, 1 Wheat. 304, 336, 337; *The Moses Taylor*, 4 Wall. 411, 429. Under that power it could allow such suits to be brought in certain specified Federal courts, in terms which would, by necessary intendment, exclude all other Federal courts, and exclude all State courts; and it could qualify the exclusion of State courts, by allowing such suits to be brought in certain specified State courts, in terms which would, by necessary intendment, exclude all other State courts. The question in the present case is, as to what Congress has done in that regard, by the enactments in the 8th and 57th sections of the act of 1864. The language of the opinion of the Supreme Court in *Kennedy v. Gibson* (before cited) treats the 59th section of the act of 1863, and the 57th section of the act of 1864, as providing for suits generally, and not merely for proceedings arising under the statute, although the point was not involved in that case. That is, also, the view of the Supreme Court of Massachusetts, in *Crocker v. The Marine National Bank of New York*, 101 Mass. 240. [See *post.*] A suit "against any association under this act" means, a suit against any association created under the act. An "association



under this act " means, properly interpreted, and in ordinary speech, "an association existing or formed under this act," because, if an association at all, it is one under the act, and, having no existence except from the act, it is an association under, that is, by virtue of the act.

Now if the 8th section stood alone, the association might be sued in any court which had authority to exercise jurisdiction over it. But the 57th section must be regarded as intended to regulate the whole subject of jurisdiction over suits against associations. It gives jurisdiction to the Federal courts of the district in which the association is established.

Under this provision, a citizen of the State where the association is established, as well as a citizen of another State, may sue it in such Federal courts. So, also, the section provides that the association may be sued in any State court in the county or city in which it is located, which has jurisdiction in similar cases. It is true, that the word used is "may," and that that word is used, in the section, in reference to both Federal courts and State courts. But that word cannot, in regard to the State courts, be regarded as permissive or enabling, because under the 8th section, a State court in the county or city in which the association is located, having jurisdiction in similar cases, might have jurisdiction of a suit against the association if the State authority so provided; and, therefore, the provision of the 57th section, in regard to State courts, if merely permissive or enabling, is surplusage, and contains no more than was already contained in the 8th section. Under the 59th section of the act of 1863, Congress made the jurisdiction of suits against associations exclusive in the Federal courts of the district in which the association was established. Under the 57th section of the act of 1864, it extended such jurisdiction, also, to certain specified State courts. But there is a clear indication that the jurisdiction of such suits by State courts was intended to be confined to the State courts specified.

If this is not so, there was no need of saying any thing about State courts, in the 57th section of the act of 1864.

The State courts specified in that section are already covered by the 8th section of the same act. It cannot be supposed that Congress did not intend that the provision in the 57th section in regard to State courts should have some meaning, and it can have none

unless as a restriction on the general provision in regard to jurisdiction found in the 8th section.

Moreover, Congress having provided for the creation of these associations, and having power to say where they may be sued, when, taking the 8th and 57th sections of the act together, we find that Congress has prescribed that they may be sued in certain designated courts, it is a proper construction of the language, to hold that they must be sued in those courts, and cannot be sued in any others.

The only reported decision to which I have been referred, which holds that the suit of Tracy against the Selma Bank could be maintained, is that of *Cooke v. The State National Bank of Boston* (before cited), in December, 1867, which holds that the provisions of the 57th section of the act of 1864 do not control or modify those of section 8 of the same act.

The subject is not discussed in the opinion delivered in that case, and the decision seems to be put principally on the ground that, unless the State courts of New York have jurisdiction of a suit against a National bank located in another State, such bank could, by removing its funds to New York, place them beyond the reach of any action that could be brought against the corporation. Congress must be presumed to have considered that question, when limiting the jurisdiction of the State courts by the 57th section, and to have regarded the provisions made by the act for obtaining possession of the assets of an insolvent bank as sufficient.

The Supreme Court of Massachusetts, in the case before cited, by the unanimous opinion of six judges in a suit brought in Massachusetts against a National bank located in New York, held that, notwithstanding the provision of the 8th section of the act of 1864, the 57th section of that act, in designating the locality of the Federal and State courts in which suits may be brought against associations, had regulated the whole subject of suits against them, and had excluded the power to bring suits against them in any courts except those designated in that section.

The subject appears to have been carefully considered by that tribunal. In the suit against the Selma Bank by Tracy, no opinion by either the Special or the General Term is furnished to me. On a full consideration of the question, I must hold that the Supreme Court of New York had no jurisdiction of the suit of Tracy against the corporation, on the ground that such jurisdiction was forbidden to it by the 57th section of the act of 1864.

This conclusion makes it unnecessary to consider the point arising under the statute of New York, as to whether the cause of action on the drafts arose in New York.

I only desire to say that I do not mean to be understood as assenting to the view that such cause of action did arise in New York.

It is contended that Cadle, by procuring himself to be made a defendant, as receiver of the bank in the suit of Tracy, submitted himself to the jurisdiction of the State court, and that, however it may have been as to the jurisdiction of that court over the bank when the suit was brought, Cadle is estopped from questioning its jurisdiction over him, or its jurisdiction to render against him the judgment which it did render.

The answer to this view is obvious. By the order of the State court of May 13th, 1868, Cadle, as receiver, was substituted as defendant in the action, with the like effect as if the action were continued in the name of the bank. Such are the express terms of the order.

Therefore, the substitution of Cadle as defendant can have no effect in respect to the jurisdiction of the court in the action, over its subject-matter, and over the bank as defendant, to confer a jurisdiction in those particulars which the court would not have had if Cadle had not been substituted as defendant. Cadle, after being appointed receiver, moved in the State court, in the suit at Special Term, to discharge the attachment. The motion was denied. That decision was, on an appeal by Cadle, affirmed by the General Term. Cadle then appealed to the Court of Appeals. That court held (37 N. Y. 523), that Cadle had no status to make such a motion, because he was not a party to the suit.

Cadle then procured himself to be made a party to it, in the manner stated.

But it was, at most, as representative and agent of the corporation that he became such party, if, indeed, he can be considered, as regards that suit, and as regards the plaintiff therein, as representing any thing except the funds attached therein.

Tracy had no cause of action against Cadle.

He proceeded in the suit, after Cadle was made defendant, to establish the original cause of action against the bank, on which the suit had been brought, and to establish it under a summons and complaint against the corporation, and under the same sum-

mons and complaint which were originally put in against the corporation in the suit. The judgment is against Cadle, as receiver, to be collected of the moneys attached — that is, against Cadle, as receiver, so far as the moneys attached were concerned, and against him, as receiver, to that extent only, or as receiver of those moneys. Tracy was not establishing or enforcing any other right, against those moneys, but such right as he had to collect his debt out of those moneys, in the suit he had brought against the bank. Cadle, then, having come in, and, in his answer in that suit, raised the point, that the court had no jurisdiction to entertain originally the suit against the bank, or to issue the attachment, cannot be regarded as having, by that act, conferred any jurisdiction on the court, to render the judgment which it did render, which it would not have had if the suit had proceeded without the substitution of Cadle as a defendant.

In *The Commercial & Railroad Bank of Vicksburg v. Slocomb*, 14 Peters, 60, 65, it is held, that, in the case of a corporation aggregate, no waiver of an objection to jurisdiction can be produced by the fact that the corporation appears and pleads by attorney, “because, as such a corporation cannot appear but by attorney, to say that such an appearance would amount to a waiver of the objection, would be to say, that the party must, from necessity, forfeit an acknowledged right, by using the only means which the law affords of asserting that right.”

This principle must apply, *a fortiori*, to the case of an insolvent and dissolved corporation represented by a receiver of its assets, acting under specific provisions of law.

If the State court had no jurisdiction originally of the suit against the corporation, and no right to attach the funds, it had no jurisdiction to render the judgment it did render, and the question stands, in this court, as if Cadle had never been made a defendant, or answered, in the suit in the State court, but had, instead, brought this present suit, in this court.

As the State court had no jurisdiction, the attachment, which is the only claim asserted by Tracy to a right to the moneys in the hands of the Ocean Bank, must fall, and the plaintiff must have a decree, declaring his title to such moneys to be free from any claim made by Tracy.

Of his title to them, under the act, the claim of Tracy being out of the way, and of his right and duty, under the 50th section, to

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collect them, and of his right to bring this suit in this court, to collect them, there can be no doubt. *Kennedy v. Gibson*, 8 Wall. 498.

Some disposition, before a decree can be entered, must be made of the case as against the defendant Kelly, as late sheriff, either by taking the bill as confessed against him, or otherwise. The injunction prayed for against Tracy must issue.

As the bill sets up and admits the lien of the United States on the moneys in the Ocean Bank, and the answer of the United States attorney also claims such lien, such lien must be recognized and declared by the decree in respect of such moneys as the Ocean Bank shall be decreed to pay.

The bill claims, that the Ocean Bank should pay to the plaintiff the full sums of money, with interest from April 15th, 1867. That bank has gone into insolvency.

Its receiver, by his answer, sets up that he has declared dividends of 70 per cent, from the assets of that bank, and expects to declare further dividends therefrom. He also admits that the Ocean Bank had the \$6,972.88, in currency and the \$8,409.96 in gold coin, and avers that the latter has been converted into \$9,155.43 in currency, making an aggregate of \$16,128.31 in currency, and that he has 70 per cent of that sum in his possession, to the credit of the Selma Bank, and payable as may be decreed by this court. The plaintiff, in a special replication to such answer, objects to the sale of the gold, and claims that the receiver of the Ocean Bank should account for the gold and currency, with interest, as a special fund or trust, unaffected by any ability to declare any dividends.

This question has not been discussed on the part of the receiver of the Ocean Bank, and the parties interested in it are entitled to be heard upon it.

*Sterne Chittenden*, for plaintiff.

*Eugene Smith*, for Tracy.

*Henry E. Tremain*, for United States Attorney.

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In re Wild.

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## IN RE WILD.

(11 Blatchford, 243.)

*Interest on loans to corporations in New York.*

In New York the rate of interest which a corporation may pay is not limited. A National bank, located in that State, loaned money to a corporation at a rate of interest exceeding seven per cent per annum. *Held*, that the interest on the loan was forfeited under section 30 of the National Banking Act (13 Stat. at Large, 108), which provided that when no rate of interest was fixed by the law of a State, a National bank might charge a rate not exceeding seven per cent, and that if it charged more, the entire interest should be forfeited.

(Circuit Court, Second Circuit, Southern District of New York.)

WOODRUFF, J. On the 13th of February, 1871, the bankrupt Alfred Wild, without consideration, and as mere surety, became the indorser of two promissory notes made by the Portage Lake and Lake Superior Canal Company, one for \$73,902.51, and the other for \$35,111.49, which, on that day, were delivered to the Ocean National Bank, and were made payable with interest. These notes were given in renewal of a number of other notes then unpaid, which had been also given in renewal of prior notes held by the bank, and which were taken from the Canal Company for a loan of two sums of \$75,000 each, made on and after the 7th of January, 1867, by the said bank. One of the sums was agreed, on the 5th of January aforesaid, to be loaned in form to the said Canal Company, and the other was at the same time agreed to be loaned to P. J. Avery, but is proved by the testimony, and was found by the referee in the District Court, to have been in fact for the benefit of the Canal Company, who, in the accounts kept of the transaction, was treated as the actual debtor for both amounts.

The reason assigned for giving to the transaction the form of two loans, one to the Canal Company and the other to P. J. Avery, was, that the National Banking Law prohibits an indebtedness by any one party, as borrower, to associations formed thereunder, to an amount greater than one-tenth of the capital of the association making the loan.

There is inconsistency, in permitting the bank, or its receiver,

to make such a transaction, and avoid the charge of violating the Banking Act, by making it a loan in part to Avery, and in part only to the Canal Company, and, on the other hand, to avoid the statutes against usury, of the State of New York, by declaring the whole to be a loan to the Canal Company, a corporation.

It would be no injustice to the bank to hold the form given to the transaction in order to save the bank from a violation, or from an apparent violation of the Banking Act, conclusive; and circumstances might, I think, be suggested, in which the bank would be estopped by it to aver that the transaction was other than it appeared on its face, and in the written instruments by which it was agreed that the loan should be made, and in the form of the notes actually given to the bank by Avery therefor.

For the purposes of the case before me, I have concluded to treat the transaction in the aspect most favorable to the bank, and in accordance with the claim made in its behalf as a loan to the Canal Company, a corporation of the State of Michigan.

The above-mentioned note for \$73,902.51 was, on the 18th of September, 1871, renewed for the amount of \$70,000, and a new note for the last-named sum, payable with interest thereon, was given by the same corporation under a new name: "Lake Superior Ship Canal Railroad and Iron Company," indorsed by the bankrupt Wild and others.

The two notes, one dated September 18th, 1871, for \$70,000 and interest, the other, dated February 13th, 1871, for \$35,111.49 and interest, constitute the claim made by the receiver of the bank against the estate of the bankrupt Wild, who indorsed them; and it is the allowance of that claim by the District Court which is appealed from by the assignee to this court.

The loan originally made by the bank was further secured by the delivery to the bank of coupon bonds of the Canal Company, secured by mortgage to the amount of two hundred thousand dollars, and it was made a condition of the loan, that the Canal Company should purchase and receive from the bank certain bonds, amounting on their face to \$237,000, of a Georgia railroad corporation, whose road had been stripped of its rails and furniture, whose track had grown up with trees and bushes, which had not been used for many years, on whose bonds no interest had been for a long time paid, and whose bonds had no market value; and their want of intrinsic value was more fully shown by a foreclosure soon

after affected, on which the road, the mortgage security for the entire issue of bonds, \$924,600, of which these were a part, was sold at public auction to the highest bidder for \$1,500. It is true that the purchaser of the road, who seems to have acted for the Canal Company, states that after obtaining an act of the Legislature of Georgia, incorporating a new company, and an act authorizing the State to guarantee another large issue of bonds to enable the new company to reconstruct the railroad, he received a like amount of stock in the new company, \$237,000, and succeeded in selling that for \$47,000, which sum he paid to the Canal Company, as and for the proceeds of the purchase which they made from the bank, and of his exertions to obtain a new charter and the pledge of State aid, without which the stock would seem to be of little, if any, value.

Recurring to the transaction between the Ocean National Bank and the Canal Company, it was made a condition of the loan of the \$150,000 by the bank to the Canal Company that, besides paying interest at seven per cent per annum, and securing the same by \$200,000 of their mortgage bonds, with power to the bank, at any time, to sell such bonds at any price not less than ninety cents on the dollar, toward the repayment of the loan (which might, therefore, not continue for more than a very brief term), the Canal Company should, also, purchase from the bank the before-mentioned nearly worthless bonds of the Georgia Railroad Company, and should pay therefor the sum of \$100,000, securing such payment by a like amount of their mortgage coupon bonds.

There was, also, a further requirement, to wit, that the trustee to whom the mortgage securing the Canal Company's coupon bonds was executed, should be removed or should resign his trust, that the president of the bank should be substituted in his place, and that the moneys loaned by the bank should only be drawn by the Canal Company from the bank by checks countersigned by the president of the bank, as such trustee.

Their president was active in the negotiations with the company and in settling the terms of the loan; and he required of the Canal Company, professedly for his own benefit, \$50,000 of their mortgage coupon bonds, as compensation for acting as trustee.

I shall place no special stress upon that payment to the president, as affecting the question of the liability of the bankrupt in this case.

It, however, belongs to the history of the transaction.



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The Canal Company having received the proceeds of the discounts of the various notes given for the loan, subsequently paid considerable sums, by paying the interest coupons attached to the bonds, held by the bank as collateral security, and other considerable sums derived otherwise ; and it seems conceded, that the two notes indorsed by the bankrupt, Wild, and the subject of controversy here constitute the residue of the claim of the bank arising out of the said loan, assuming its entire validity and their title to the same, with interest.

The assignee of Wild (the appellant here) insists, that the loan was usurious, and that there is, on that ground, no valid claim against Wild, as indorser ; that, under the National Banking Act, the loan being made by the bank reserving a compensation exceeding seven per cent interest per annum, all interest on the loan was forfeited, and the payments made by the Canal Company amount to satisfaction of the principal debt ; and that the notes, therefore, which are here presented bearing the indorsement of the bankrupt, are without consideration, and constitute no valid claim against his estate.

In the court below the transaction was assumed to be such, that, had the loan been made to an individual instead of a corporation, it was a violation of the statutes of New York regulating the subject of interest, and the securities or notes given therefor would have been void for usury.

In that view of the subject I most fully concur, and must find, as a fact, upon the evidence, that the conditions of the loan reserved to the bank, in money, more than seven per cent per annum. No one unaffected by interest, bias or prejudice can, I think, read the testimony without being satisfied that the bank, in prescribing the terms of the loan, made it an occasion for extorting from the Canal Company most onerous conditions, greatly exceeding lawful interest, and that the form of a sale of Georgia railroad bonds, for a price far above their either real or market value (if, indeed, they had any value, which is very doubtful), was only a cover and means of securing in money the excessive and illegal compensation the bank reserved and secured for making this loan.

It was, however, held below, that under the laws of the State of New York, which forbid a corporation to interpose the defense of usury, the transaction must be deemed between the bank and the Canal Company a legal transaction, the notes given by the Canal

Company to the bank legal and binding notes, and, therefore, the indorsement thereof by the bankrupt, as surety for the Canal Company, a legal and binding indorsement; and, further, that the provisions of the National Banking Law relating to the interest which National banks may receive, and imposing penalties for charging more, do not affect the transaction, because they only apply to States which have no laws fixing the rate of interest.

It was not the intention of Congress, when enacting the National Banking Law, to authorize National banks in respect to exacting interest, to violate the laws of the States within which they might be organized, nor, as I think, to relieve them from the consequences of such violation prescribed by the State laws, if they were guilty thereof.

This is the result of the decision of the Court of Appeals of the State of New York, in *First National Bank of Whitehall v. Lamb*, 50 N. Y. 95.

Without adopting the reasoning of the opinion in that case, I deem the conclusion as above stated correct.

On the other hand, it was entirely competent for Congress when providing for the organization of National banks, to place them under such restrictions in respect to the rate of interest which they might charge or receive, as Congress might see fit.

As creatures of their own creation, they could be subjected to such inhibitions as were deemed expedient, even though the privileges were far short of those enjoyed by State banks, or by individuals within the several States.

This would involve no conflict with State laws, nor be an attempt to regulate private and domestic affairs within the States beyond the powers of the Federal government.

It would be merely defining the powers and regulating the conduct of the organizations which existed only by force of Federal enactment, possessed the powers Congress chose to confer upon them, and exercised them subject to the restrictions and conditions of the law giving them existence. Indeed, the acceptance of the organization under the law, and the enjoyment of its privileges are necessarily subordinate to the conditions upon which the powers and privileges are conferred. Hence, had Congress seen fit to say that no National bank should contract for, reserve, or receive more than at the rate of five per cent per annum for a loan of money, or for or upon the discounting of a note, bill, or other security, it would have been a perfectly valid limitation of their powers.

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In re Wild.

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It would be in no conflict with any law of a State which permitted the making of loans in general at a higher rate of interest; and, if Congress could do this, Congress could also declare the forfeiture or penalty incurred by the National bank for violating the prohibition.

Such bank would still be left subject to the operation of the State law imposing, it might be, a different penalty for the violation of its own State laws, as was held by the New York Court of Appeals in the case above referred to.

It follows that transactions may not be condemned by the State laws, applied to individuals or to corporations in general, and may, under such State laws, be legal and valid, which, nevertheless, National banks may not make, and for which, if made, they may be liable to penalties or forfeitures prescribed by the law of their being. It may be that in reference to the conduct of merely private or domestic affairs within the States, having no connection with or relation to their functions or agents of the government, Congress cannot authorize National banks to do what is forbidden by State laws, nor relieve them from the forfeitures or penalties prescribed by State laws for doing what is so forbidden.

But this concession would be far short of admitting that, within the range of what the State laws do permit, Congress may not restrict National banks as is seen fit, or may not impose such penalties and forfeitures for a violation of those restrictions as Congress thinks lawful. These latter propositions are unquestionable.

How, then, do the laws of the State of New York and the National Banking Law bear upon the case under consideration?

The 30th section of the National Banking Act of June 3d, 1864 (13 U. S. Stat. at Large, 108), provides that "every association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State or Territory where the bank is located, and no more, except that where, by the laws of any State, a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized in any such State under this act.

And, when no rate is fixed by the laws of the State or Territory, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run.

And the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid, shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon.

And, in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same : Provided, that such action is commenced within two years from the time the usurious transaction occurred."

The State of New York has statutes which prohibit the taking, receiving, or reserving of interest for the loan or forbearance of money, etc., at a greater rate than seven per cent per annum, and making any note, or bill, or other contract whereon or whereby any greater rate is reserved void.

But the State has a further statute (Laws of 1850, chap. 172, p. 334) which enacts that no corporation shall interpose the defense of usury in any action.

Such was the state of the law in New York when the National Banking Act was passed.

The force and effect of this last-named statute has been declared by the courts of the State of New York in numerous cases.

Those cases are collected, carried to what is deemed their legitimate conclusion, by the Court of Appeals, and distinctly affirmed, in *Rosa v. Butterfield*, 33 N. Y. 665.

The doctrine of that case is, that the dealings of a corporation, as a borrower, and its contracts or obligations for loans, are unaffected by any laws of the State of New York regulating interest ; that, as to them, such laws theretofore existing are repealed ; that, therefore, the rate of interest which corporations may agree to pay is not fixed or limited, but they may agree to pay any rate they see fit, and their contract will be valid ; and, also, that one who becomes surety, guarantor, or indorser of such a contract is legally bound to its performance — in short, that, as to contracts made by corporations, whether foreign or domestic, whether made in the State of New York or elsewhere, they stand, in the State of New York, as if no usury law existed. See, also, *Belmont Bank v. Hoge*, 35 N. Y. 65.

In respect to contracts made within the State of New York, or

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In re Wild.

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entered into under or with reference to the laws of the State, I may accept the exposition thus given of the state of the law of New York ; and it follows, that there is no law in New York fixing the rate of interest which any one may take upon the loan of money to a corporation, or, in other words, any rate of interest is allowed to which the parties may agree.

As to dealing with corporations, National banks in the State of New York are, therefore, within the case described in the National Banking Law above cited, to wit, "when no rate is fixed by the laws of the State or Territory, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum," etc.

This is a necessary and logical result.

If the rate were fixed by the laws of New York, then her usury laws would apply.

If the limitations in her statutes relating to interest do not apply, then no rate is fixed by her laws.

Hereupon the restriction, contained in the section of the National Banking Law, comes into effect without any interference or conflict with State laws, that is to say, a National bank "may take, receive, or charge a rate not exceeding seven per centum, and such interest may be taken in advance," etc., "and the knowingly taking, reserving, or charging a rate of interest greater than the aforesaid, shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon ; and, in case a greater rate of interest has been paid, the persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same ; provided that such action is commenced within two years from the time the usurious transaction occurred."

It is not necessary that I should express an opinion upon the question whether this forfeiture and right to recover back can, in any circumstances, be applicable to the case mentioned in the previous clause of the section, to wit, where the National bank reserves or receives a greater rate of interest than is allowed by the laws of a State in which a rate is fixed and limited by the State laws. It is sufficient for the purposes of the present case that it does apply to a case in which no rate is fixed and limited.

By the laws of the State of New York, as expounded by her high-

In re Wild.

est court no rate of interest upon loans to a corporation is fixed or limited.

It follows, that the transaction in question was within the prohibition of the National Banking Law, and that the bank, *eo instanti*, it made the loan upon the terms exacted, incurred the forfeiture of the entire interest which the notes received, carried with them, or which was agreed to be paid thereon.

Discounting the notes did not render it less true, that the notes themselves carried with them the principal loaned and the interest agreed to be paid, which, with the bonds also given, necessarily included all the pecuniary benefit agreed to be paid as compensation for the loan, whatever form the transaction was made colorably to assume.

The bankrupt, as mere accommodation indorser or security, is, upon familiar principles of equity, entitled to all the protection which his principal (the Canal Company) would have if the notes in question were sought to be enforced against it.

I do not say that he can recover back money paid by the Canal Company, but he has a right to inquire whether, in view of the forfeiture of the entire interest by the bank, there is any thing due to the bank upon the notes which he indorsed, and thereby to ascertain whether, and to what extent the two notes now in question are without consideration.

It is claimed, by the assignee of the bankrupt, that treating the entire interest as forfeited, the bank has already been paid the whole of the principal of the loan.

I am not fully satisfied that a small sum, part of such principal, is not still due.

Upon the proofs taken, the account would seem to stand thus:

Dr.		
Loan.....	\$150,000 00	
Less the interest or discount included in the notes given therefor from time to time.....	27,117 26	
	<hr/>	\$122,882 74
Cr.		
Cash payment by Canal Company.....	\$88,750 00	
Coupons paid Canal Company.....	58,476 67	
Note paid.....	12,798 90	
Cash paid on giving the note for \$73,902.51, which according to the testimony made up the whole amount, \$76,532.19.....	2,629 68	
	<hr/>	
Carried forward .....	\$162,655 25	\$122,882 74

In re Wild.

Brought forward.....	\$162,655 25	\$122,882 74
Cash paid on renewal of the note for \$73,902.51, when the \$75,000 note, now in question, was given...	3,902 51	
	<u>\$166,557 76</u>	

From which are to be deducted sundry charges to which these payments appear to have been in part applied, viz.:

Another note for \$25,000, and interest....	\$25,452 80	
Another note for \$12,500, and interest....	12,726 40	
Interest on these notes after maturity ....	678 00	
Coupons paid by the bank for the company	8,068 12	
Interest thereon.....	113 25	
	<u>47,038 57</u>	119,519 19

Leaving a balance of principal due when the notes in question were  
indorsed by the bankrupt... \$3,363 55

To this extent, of \$3,363.55, without interest, it would seem the claim of the receiver should be allowed, but the estate of the bankrupt is entitled to have the collateral security held by the receiver of the bank, or the proceeds thereof, applied to this balance, in exoneration of the estate of the bankrupt, on a sale of a portion of which, by order of the District Court, it appears, by the order appealed from, \$23,663.30 has been already realized.

I by no means make this statement of the account as a final and conclusive statement.

The proofs on the part of the bank do not appear to have been put in with a view to the statement of an account upon the principle affirmed in this opinion.

The value of the collateral security held by the receiver, or the proceeds of that portion thereof which appears to have been deposited in the Trust Company, under the order of the District Court (\$23,663.30), may be, and probably are, so clearly greater than any balance which a more accurate statement of the account would show to be due, upon the principles of this opinion, that any further expense of taking proofs and stating the account would be improvident and wasteful.

But, if insisted upon, a reference may be had to state such account.

The order appealed from must be modified to conform to the foregoing opinion.

*Everett P. Wheeler* and *Francis S. Silvester*, for the assignee.

*Francis N. Bangs*, for the receiver.

## UNITED STATES V. TAINTOR.

(11 Blatchford, 374.)

*Indictment for embezzling and misapplying funds of bank—Evidence of—Intent.* \*

The cashier of a National bank was indicted under section 55 of the act of 1864 (13 Stat. at Large, 116), for embezzling, abstracting and willfully misapplying the moneys and funds of the bank "with intent to injure or defraud the association." *Held*, that the intent to injure or defraud was conclusively presumed upon proof of the act charged, and that therefore evidence was not admissible to prove that the cashier used the funds with the knowledge and consent of the president, and some of the directors of the bank, and on account of and for the benefit of the bank.\*

(Circuit Court, Second Circuit, Southern District of New York.)

**I**NDICTMENT of Taintor, cashier of the Atlantic National Bank, under section 55 of the act of 1864 (13 Stat. at Large, 116), for embezzling, abstracting and willfully misapplying the moneys and funds of said bank "with intent to injure or defraud the association.

On the trial the prosecution proved that the defendant took the moneys and funds of the bank and used them in stock speculations carried on in his own name by depositing the same with a stock broker as "margins" for stocks bought on his account.

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\* See *Matter of Van Campen*, ante, p. 185; *State v. Tuller*, post; *Commonwealth v. Tenney*, post; *Commonwealth v. Barry*, post, and cases cited. The Revised Statutes provide as follows: "Sec. 5209. Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgages, judgment, or decree; or who makes any false entry in any book, report, or statement of the association, with intent, in either case, to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association, and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."



For the purpose of disproving the allegation that the acts were done with intent to injure or defraud the association, evidence was offered on behalf of the defendant to prove that the moneys and funds were so used with the knowledge and approbation of the president and some of the directors of the bank, and that all the said transactions were intended for the account and benefit of the bank, and were believed by the defendant to be sanctioned by the president and some of the directors, although there was no formal resolution of the board of directors authorizing or approving them.

This evidence was excluded and the defendant was committed.

A motion for a new trial was now made, and was heard by WOODRUFF, BLATCHFORD and BENEDICT, JJ.

*George Bliss*, district attorney, for the United States.

*A. Oakley Hall* and *James C. Carter*, for defendant.

BENEDICT, J. The ruling called in question upon this motion involved two propositions, namely, that the guilty intent charged in the indictment was shown by the proof of the acts done by the defendant; and, further, that the facts offered to be proved by the defendant would not, in law, avail to negotiate that intent. It has hardly been doubted upon this motion, that the first of the proposition is correct. The correctness of the second is strenuously denied, and is now to be determined.

It is a general rule of law, that a man must be held to intend the necessary consequences of his acts. This rule is applicable as well to cases of crime as in civil causes, for, whatever proves intent anywhere proves it everywhere. It has often been so applied. Furthermore, in certain cases, and these criminal, the proof of guilty intent afforded by evidence of acts knowingly done has been held to be conclusive, and not overthrown by proof of any other facts; and this class of cases has not been limited to acts *mala in se*, nor to crimes at common law. On this argument it was conceded that, by virtue of the rule in question, the guilty intent is conclusively shown by proof of the act done, where the nature of the act is such that a guilty intent is so clearly manifested thereby as to admit of no question. It appears to us that the rule, even thus limited, covers the present case and justifies the decision made at the trial. For, the act done by the defendant was clearly unlawful, and he is precluded from denying knowledge

that it was so. He was an officer of an association created under a statute which does not permit any person to make such a use of the funds of the association as were here made. Furthermore, the act of the defendant rendered the association liable to a forfeiture of its charter. Still further, it cast upon the bank a risk which attached at the instant of the doing of the act, and this a risk notoriously great, extraordinary in character, and outside of the bounds of proper commercial use. It placed the capital of the bank beyond the control of the officers of the association, and it was an unlawful dealing with the money of a corporation belonging to a class of institutions whose welfare is intimately connected with the public welfare, which are liable to be depositaries of the public moneys, and which cannot justly be considered to be merely private pecuniary trusts. The act of the defendant, therefore, necessarily involved injury, not only to the association, but also in a proper sense, to the public. An act having such characteristics, and involving such consequences when knowingly done, discloses moral turpitude, and cannot be innocent. It may, therefore, well be held, that proof of such an act proves conclusively an intent to injure, because, when knowingly done, it affords no opportunity for justification or legal excuse, and manifests so clearly a general guilty intent as to make it of no consequence what other particular intent co-existed therewith, and to preclude inquiry as to such other intent, or into the motives which impelled to its commission. A generous motive is not inconsistent with a guilty intent, and proof of the one does not disprove the other. Our opinion, therefore, is, that the circumstances offered to be proved by the defendant would not tend to disprove the guilty intent charged in the indictment.

But it is contended that the phraseology of the statute under which the indictment is framed, requires proof of something more than the general guilty intent necessarily involved in such a misapplication of the funds of a National bank, inasmuch as it couples with the words "embezzle, abstract, and willfully misapply," the words "with intent to injure or defraud the association," and thus requires the presence of a corrupt motive, a design to cheat the association out of money, in order to constitute the offense. It is unnecessary to determine whether the latter words, as here used, are intended to be taken in connection with the words "embezzle, abstract, or willfully misapply," because this has been assumed by

the prosecution, and the indictment in each count charges an intent to injure and defraud the association. The question presented, therefore, is as to the effect produced upon the words, "embezzle, abstract, or willfully misapply," by the addition of the words "with the intent to injure or defraud the association."

In considering this phraseology, it will be noticed that, while the word "embezzle," and perhaps, also, the word "abstract," refers to acts done for the benefit of the actor as against the bank, the word "misapply" covers acts having no relation to the pecuniary profit or advantage of the doer thereof. A design to make criminal acts done without reference to personal advantage is thus clearly disclosed, and it appears that the intention of the statute was to cover cases of unlawful dealings with the funds of the bank by its officers, although without a corrupt motive. This intention, manifested by the insertion of an emphatic and significant term in the commencement of the section, it cannot be supposed was intended to be defeated by the subsequent use of the words "with intent to injure or defraud." Nor can such effect be given these words without treating the word "injure" as synonymous with "defraud," and as referring to a misapplication for the benefit of the doer. But, if the signification of the word "defraud" be limited to a malicious dealing with property for the personal advantage of the doer — and it is always to be so limited — the word "injure" is not of such limited application, and was doubtless inserted to cover cases of misapplication causing injury to the association without benefit to the offender. The guilty intent required by the statute would, therefore, still exist, although it be shown that no personal pecuniary benefit was anticipated by the defendant, and the requirement of the statute is fulfilled by proof of general guilty intent involved in the act knowingly committed.

The phrase "intent to injure or defraud" is the same one used in indictments for forgery. There it refers to a general guilty intent, and such indictments are held conclusively proved when the act is proved to have been knowingly committed. The phrase should be considered to have the same meaning in the statute, and to be proved in the same way. Nor does this construction render the words nugatory. On the contrary, they are given precisely the same effect which they are held to have in indictments where their presence has been considered to be necessary. A similar effect has been given to this same phrase in other statutes. Thus Lord Ch.

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Chemical National Bank v. Bailey.

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J. TINDAL has observed, that, "where a statute directs that, to complete an offense, it must have been done with intent to injure or defraud any person, there is no occasion that any malice or ill-will should subsist against the person whose property is so destroyed. It is a malicious act in contemplation of law, when a man willfully does that which is illegal, and which, in its necessary consequences, must injure his neighbor." 5 C. & P. 266, note; Russ. on Crimes, 575; *Com. v. Snelling*, 15 Pick. 340. It is, indeed, true, that this construction of the statute under consideration imputes to the legislature the policy of making some acts criminal which may not have been before classed as crimes; and if, as it seems to be here suggested, the moral sense of the business community has become so blunted that such acts as this defendant is conceded to have committed have come to be considered "innocent or even praiseworthy," the urgent need of the adoption of such a policy affords good ground for supposing that its adoption was intended by the statute.

Our opinion, therefore, is, that no error was committed in rejecting the evidence offered by the defense upon the trial of this cause; and the motion for a new trial must, accordingly, be denied.

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### CHEMICAL NATIONAL BANK v. BAILEY.

(12 Blatchford, 480.)

*Interest on claims against insolvent banks — Demand not necessary by a depositor.*

Where a National bank is declared in default by the Comptroller of the Currency, and a receiver is appointed, and a sufficient fund is realized from its assets to pay all claims against it and leave a surplus, the Comptroller should allow interest on the claims, during the period of administration, before appropriating the surplus to the stockholders of the bank.

An action of assumpsit to recover such interest will not lie against the Comptroller of the Currency or the receiver of the bank, but will lie against the bank.

Where a bank has, by reason of its own default, been placed in the hands of a receiver, a demand of payment by a depositor is no longer a necessary condition precedent to a right of action for the deposit; and the deposit bears interest from the time of such default. \*

(Circuit Court, Second Circuit, Southern District of New York.)

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\* See *National Bank of the Commonwealth v. Mechanics' National Bank*, ante, p. 133.

**W**ALLACE, J. It is stated by counsel that these actions are brought to determine whether, when the Comptroller of the Currency has declared a National bank in default, and appointed a receiver under the provisions of the act under which such banks are organized, and a sufficient fund is realized from the assets to pay all claims against the bank and leave a surplus, the Comptroller should, or should not, allow interest on the claims during the period of administration, before appropriating the surplus to the stockholders of the bank. It is to be assumed from this statement that the claims in question were due and payable when the Comptroller took control of the affairs of the bank. If they were not, of course no interest should be allowed upon them, except from such time as they may have become due, unless they were for demands conditioned for the payment of interest.

The equity of the creditors to receive interest on their claims for the time during which they have been precluded from receiving their principal, is obvious. On general principles, and by adjudications in point, their right is clear. Interest is allowed not only on strict legal grounds, where there is a contract for the payment of interest, or by way of damages, where there is a wrongful detention of debt, but upon considerations of equity and natural justice which always arise where a party is entitled to a payment of money and cannot obtain it, except by resort to a fund created by operation of law, the distribution of which is attended with delay. It is upon this ground that when, by statute, preference is given to one class of creditors over another in the distribution of an estate, the preference includes interest on the preferred class of claims. *In re Shultz*, 11 Serg. & Rawle, 182.

There is nothing in the provisions of the act under which this fund is to be distributed in conflict with this general rule. While the Comptroller is not directed by express terms to allow interest to creditors, the act contains no language which in terms or by implication prohibits him from doing so. The 50th section of the act of June 3d, 1864 (13 U. S. Stat. at Large, 115), authorizes him, on becoming satisfied that an association has made default in the payment of any of its circulating notes, to appoint a receiver of its affairs and place him in possession of its assets. The receiver is required to pay over all moneys realized from the assets to the Treasurer of the United States, subject to the order of the Comptroller, and it is the duty of the Comptroller, from time to time,

to make ratable dividends from such moneys upon "all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction," and to distribute the remaining proceeds among the stockholders. His position in reference to the distribution of the fund confided to him is analogous to that of an assignee of an insolvent estate, or an administrator of the estate of a deceased person. When an insolvent law provides that, after the payment of all debts proved, the assignee shall pay any surplus to the debtor or his legal representatives, the creditors are entitled to interest on their debts during the period of administration, and without regard to the fact whether the debts are those upon contract conditioned for the payment of interest or not. *Brown v. Lamb*, 6 Metc. 203; *Atlas Bank v. Nahant Bank*, 3 id. 581. Claims proved to his satisfaction are to be paid by the Comptroller, as debts proved against an insolvent are to be paid by his assignee; and in the one case, as in the other, the interest is an incident of the debt or claim, and to be paid before distribution of the surplus.

Thus far the general question of liability for interest has been considered. It remains to consider other questions presented by the record, which are necessary to the proper determination of these actions in the form in which they have been brought. In each action the complaint counts in assumpsit, and a general demurrer has been interposed, alleging that the complainant does not state sufficient facts to constitute a cause of action. The practice of the courts of this State now prevails in actions at law in this court, and by that practice judgment may be rendered for or against one or more of several defendants.

It is clear that this action cannot be maintained against the receiver or the Comptroller. The receiver has no control over the assets, except to pay their proceeds to the Treasurer of the United States, and would, therefore, not be liable to the plaintiff in any form of action. If an action could be maintained against the Comptroller, it would be one to enforce a proper distribution of the fund, and for this purpose the action of assumpsit is not an appropriate remedy. As against these defendants, therefore, no cause of action is alleged in the complaint, and as to them the demurrer is well taken, and judgment must be ordered in their favor.

As against the defendant, the National Bank of the Common-

wealth, the demurrer must be overruled. The corporation continues to exist for the purpose of being sued, notwithstanding the Comptroller has intervened pursuant to the provisions of the act under which it was organized; and demands against it can be prosecuted to adjudication in any court of competent jurisdiction. *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 313.\* In such an action interest is recoverable upon all demands originated in contracts conditioned for the payment of interest, and on all demands for money due and unpaid, by way of damages for the non-payment after such demands became due. It is urged, that interest is not recoverable upon debts against the bank, because it has been prevented by law and by superior authority from paying the principal. It is a sufficient answer to this argument to say, that this proposition is not applicable, because the bank, by its own default, subjected itself to the proceedings of the Comptroller, and it does not lie with the bank to assert any exemption from liability by reason of its own acts or defaults.

In one of these cases, a portion of the plaintiff's demand is for a balance due upon deposits made in the ordinary way with the bank, and it does not appear that any demand was made for the amount until a long time after the receiver had taken possession. Ordinarily, an action cannot be maintained by a depositor, against a bank, until a formal demand has been made; and of course, no interest can be recovered except that arising after the demand. The bringing of an action does not amount to a demand, in such cases. *Payne v. Gardner*, 29 N. Y. 146. But, if the bank, by words or contract, denies the depositor's right to his balance, it becomes presently liable to an action, without formal demand, and interest would be recoverable, as damages. All the facts are set forth in the complaint, which justified and led to the action of the Comptroller. The bank, by its default, initiated proceedings which resulted in a transfer of the moneys of its depositors to a receiver, and thus put it out of its own power to pay its depositors, when called upon to do so. A demand, under such circumstances, would have been an idle ceremony. The bank cannot be permitted to say that the depositor should have made a demand, when, if made, it would have been nugatory and useless. It has been held, that, in cases of insolvency, where a debt is payable on demand, and no special demand is shown, interest is to be computed from the first

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 Kansas Valley National Bank v. Rowell.
 

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publication of the proceedings in insolvency. *Brown v. Lamb*, 6 Metc. 203. Reason and analogy favor the application of the rule to the present case.

Judgment is accordingly ordered for the plaintiff in each action, as against the bank.

*E. Platt Johnson and Richard M. Henry*, for plaintiff.

*Edward H. Smith* (assistant district attorney), for defendants.

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 KANSAS VALLEY NATIONAL BANK V. ROWELL.

(2 Dillon, 371.)

*Power of National banks to take mortgages on real estate.*

A National bank may take a mortgage on real estate to secure a debt previously contracted, but not to secure either a contemporaneous loan or future advances.\*

(Circuit Court, Eighth Circuit.)

**B**ILL in equity for the reformation of a mortgage executed by one Schuyler, a bankrupt, to the complainant, a National bank, to secure the payment of the sum of \$3,000 then owing from said Schuyler to the complainant, and also to secure any moneys advanced to said Schuyler by said complainant within one year from the date of the mortgage. The ground for reformation was, that the mortgage was so drawn as not to cover the property intended.

The 8th section of the National Banking or Currency Act, of June 3d, 1864, in enumerating the powers of associations formed thereunder, provides that they "may make contracts \* \* \* as fully as natural persons," \* \* \* and "exercise under this act all such incidental power as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes,

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\* See *National Bank v. Mears*, *post*; also the following cases hereinafter reported; *Matthews v. Skinner*, 62 Mo. 329; *Ornn v. Merchants' National Bank*, 16 Kans. 341; *Spafford v. First National Bank*, 37 Iowa, 181; *First National Bank v. Haire*, 36 Iowa, 443; *Fowler v. Scully*, 72 Penn. St. 456; *Woods v. People's National Bank*, 83 Penn. St. 57.—REPORTER.



drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin, and bullion; by loaning money on personal security; by obtaining, issuing, and circulating notes according to the provisions of this act; and its board of directors shall also have power to define and regulate, by by-laws, not inconsistent with the provisions of this act, the manner in which its general business shall be conducted, and all the privileges granted by this act to associations organized under it shall be exercised and enjoyed," etc.

The 28th section enacts "that it shall be lawful for any such association to purchase, hold, and convey real estate as follows: First. Such as shall be necessary for its immediate accommodation in the transaction of its business. Second. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted. Third. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. Fourth. Such as it shall purchase at sales under judgments, decrees, or mortgages, held by such association, or shall purchase to secure debts due to the said association.

"Such association shall not purchase or hold real estate in any other case, or for any other purpose, than as specified in this section.

"Nor shall it hold the possession of any real estate under mortgage, or hold the title and possession of any real estate purchased to secure any debts due it for a longer period than five years."

The cause came before the court on a general demurrer to the bill for want of equity.

*C. C. Clemens*, for plaintiff.

*John K. Cruvens*, for assignee.

DILLON, Circuit Judge. The mortgage, of which a foreclosure is sought, was made by the bankrupt for the double purpose of securing a debt to the plaintiff previously contracted, and to secure further advances, which are alleged to have been subsequently made. The mortgage is upon real estate.

The bill alleges a mistake in the description of the property, and asks that this mistake be corrected and the mortgage foreclosed.

The assignee files a general demurrer, and insists that under the National Banking Act of June 3d, 1864 (§§ 8 and 28), the plaintiff,

as a corporation organized under that enactment, has no right to take, hold, or foreclose a mortgage upon real estate, except as a security for a debt contracted before the taking of such mortgage; that the mortgage here in question was made upon but one consideration, part of which, to wit, that part which related to future advances, is illegal, and being so, the mortgage is wholly void.

Upon the averments of the bill it is my opinion that the mortgage was made for the two purposes above mentioned, namely, to secure a precedent debt to the bank, and also to secure future advances to be made by the bank.

I am also of the opinion (under §§ 8 and 28 of the National Banking Act), that a mortgage upon real estate is clearly authorized as "a security for debts previously contracted," and as clearly unauthorized when made as a security for money to be thereafter advanced by the bank, on the strength of such security.

The mortgage in question rests upon a valid consideration, and is authorized by the law, so far as it secures a debt previously due to the bank, by the mortgagor, and it is invalid so far as it undertook to secure a debt then or thereafter to be created.

The line which separates that which is good from that which is bad, is plain; and I am of opinion that the defendant's counsel are mistaken in supposing this to be a case in which the consideration is indivisible and the whole mortgage void.

The two parts of the security are easily separable, and the result is that the good stands, and the bad must fall.

It follows that the court may correct the mistaken description in the mortgage in suit and enforce the same, so far, and so far only, as it was given to secure a debt to the bank previously contracted.

The demurrer being general, it is overruled.

DELAHAY, J., concurs.

*Judgment accordingly*

## FIRST NATIONAL BANK OF OMAHA V. COUNTY OF DOUGLAS.

(3 Dillon, 298.)

*National banks may sue in the Federal courts — Tax on capital — When a court of equity will restrain.*

National banks may, by reason of their character as such, sue in the Federal courts.

Where there is no means of recovering back from the State taxes illegally assessed and paid into the treasury, a court of equity will enjoin their collection; and when both State and county taxes are included in one warrant and are for a common reason illegal, the court will at the same time determine the validity of both the State and the county taxes.

State authorities will be enjoined from collecting a tax on the capital stock of a National bank, invested in United States securities.

(Circuit Court, Eighth Circuit.)

**B**ILL for an injunction to restrain the collection of State and county taxes levied on the capital stock of the plaintiff.

*J. M. Woolworth*, for plaintiff.

*J. C. Cowin*, for defendant.

MILLER, Circuit Judge, held:

1. National banks may, by reason of their character as such, sue in the Federal courts.

2. A part of the taxes sought to be restrained being for the State of Nebraska, and the county treasurer being by the revenue law of the State required to pay the same into the treasury when they are collected, and no provision being made by law for an execution or other proceedings against the State for the recovery of them back if illegally exacted, the plaintiff has no adequate remedy at law, and equity will intervene by injunction to restrain the collection of such illegal taxes.

3. When a county treasurer holds one warrant in which he is commanded to enforce payment of both State and county taxes, which for a common reason are illegal, equity, having jurisdiction to restrain the treasurer from enforcing the payment of the State

## First National Bank v. Douglas County.

taxes, may proceed to the determination of the validity of the county taxes as well and restrain them also.

4. The First National Bank of Omaha filed its bill against the county of Douglas and its treasurer, to have it declared that the taxes of 1870 and 1871, levied by the State of Nebraska and the county of Douglas upon the capital stock of the bank, were illegal, and to restrain that officer "from making distress upon the property of the plaintiff, as he threatened to do, and from all other proceedings to enforce the payment" of the taxes. On motion for an injunction the defendant objected to the jurisdiction of the court as a Federal court, and also as a court of equity. *Held*, that there was jurisdiction to entertain the bill and allow an injunction.

*Injunction allowed.*

## FIRST NATIONAL BANK V. DOUGLAS COUNTY.

(3 Dillon, 330.)

*Taxation of National bank shares — Distrain of bank property to enforce payment of tax.*

A State statute provided that "the stockholders of every National bank located in this State, or of any bank incorporated under the laws of the State, shall be assessed and taxed on the value of their shares of stock therein, subject to the restriction that taxation of such shares shall not be at a greater rate than is assessed upon any other moneyed capital in the hands of individual citizens of this State in the county or precinct where such bank is located. The taxes against such shares shall be levied against the holder of the same, and shall be paid by the bank." *Held*, that a tax so imposed on the shares of a National bank was valid, and that payment thereof could be enforced by distrain of the property of the bank.

(Circuit Court, Eighth Circuit.)

**B**ILL in equity to restrain the collection of a tax. The opinion states the case.

*J. M. Woolworth*, for plaintiff.

*J. C. Cowan and J. M. Thurston*, for defendant.

DILLON, Circuit Judge. This is a bill by the First National Bank of Omaha, to restrain the collection of a tax assessed and levied under the revenue laws of the State, for the year 1873, upon the shares of the shareholders in the bank, and which tax, it is

alleged, the collector is about to collect by entering the banking-house of the plaintiff and seizing its property.

The bill avers that the capital of the plaintiff is \$200,000, and that this amount is wholly invested in bonds issued by the United States; the stock is divided into shares of \$100 each, and is valued for taxation at that sum. The object of this bill is to have the whole tax declared void, and to restrain its collection.

The principal ground for the relief asked is, that the act of the Legislature of the State, passed February 27th, 1873, which provides for the taxation of shares in National banks, is void, for non-compliance with the conditions upon which, under the acts of Congress, such taxation by the State, or under its authority, is permissible.

The third section of this act is in these words: "The stockholders of every National bank located in this State, or of any bank incorporated under the laws of the State, shall be assessed and taxed on the value of their shares of stock therein in the precinct where such bank is located, whether the stockholders reside in such place or not. Such shares shall be listed and assessed with regard to the ownership thereof, subject, however, to the restriction that taxation of such shares shall not be at a greater rate than is assessed upon any other moneyed capital in the hands of individual citizens of this State, in the county or precinct where such bank is located. The shares of capital stock of National banks not located in this State, held in this State, shall not be required to be listed under the provisions of this act. Each National bank shall furnish to the assessor a full and correct list of the names and residences of its stockholders, and the number of shares held by each, and the assessor shall report the same to the county clerk in his assessment return. The taxes against such shares shall be levied against the holder of the same, in the list of personal property, and shall be paid by the bank.

The revenue law of the State further provides that the value of stock incorporations shall be taxed, and that "in assessing the value of such stock, the actual value, in cash, of all the property that is represented, shall be considered, and no deduction shall be made in such valuation by reason of debts owing by said corporation, unless, as in other cases, such deductions be made from the item of money and credits listed by such corporation."

The plaintiff contends that the act of February 27th, 1873, is void, and no tax can be lawfully levied thereunder, because :

1. The act does not provide that the tax imposed on the shares

shall not exceed the rate imposed upon the shares of banks organized under the authority of the State.

2. The act in effect provides for the taxation of the capital of the National bank, and not of the shares in the hands of the stockholders thereof, forasmuch as thereunder the valuation of the entire property of the bank is to be first ascertained, and the bank itself to pay the taxes — the name of the stockholder being used merely to give to the proceedings the color of a tax upon the shareholder's interest.

The act of Congress, in express terms, allows the States to impose taxes upon the shares of National banks, and the only substantial limitation upon the power of the States is that they shall not subject these shares to taxation to an amount greater than they assess upon their own banks, or upon moneyed capital in the hands of their own citizens.

The first objection above stated to the State enactment is not well taken. The act provides in terms that the stockholders in all banks, State and National, shall be assessed and taxed on the value of their shares therein. This is equivalent to a provision that there shall be no discrimination in favor of the State banks, and against the National banks, and it is not necessary that there should be added a clause that the tax imposed on the shares in National banks shall not exceed that imposed on shares in State banks.

It is next urged as an objection to the State legislation above mentioned, that it in effect provides for a tax upon the capital instead of the shares of the banks, and that the capital of the plaintiff is invested in United States securities, which are exempt from taxation, the taxation under the law of the State is illegal. By recurring to the act of the State, it will be seen that it does not undertake to tax capital, but only shares, and that this mode is prescribed for shares in both classes of banks. It is settled by the decisions of the Supreme Court of the United States that, as respects the power to tax, there is a distinction between capital and shares; and that the shares may be taxed although the entire capital of the bank is invested in United States bonds, and that in the valuation of such shares for taxation, such valuation is not illegal because the assessing officers have not deducted the value conferred upon the shares by the non-taxable United States securities owned by the bank. *Van Allen v. Assessors*, 3 Wall. 573; *People ex rel. Duer v. Tax Commissioners*, 6 Am. Law Reg. 467; *Lionberger v. Rouse*, 9 Wall. 470.

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Bowden v. Santos.

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The above cases are decisive against the objection we are now considering to the act of the State. It does not attempt to discriminate against the National banks, but provides one and the same mode for ascertaining the value of shares in the stock of all corporations, and more than this the legislation of Congress does not require. *Lionberger v. Rouse, supra.*

The bill does not state that the valuation of the shares in the plaintiff's bank is in excess of their actual value, nor that the valuation of the shares in the State Bank of Nebraska is less than their real value, and states no fact showing that the taxation, which the plaintiff seeks to avoid, is in fact excessive or disproportionate. It is, therefore, destitute of any substantial equity.

It is alleged on information and belief that the capital of the banking partnership of Caldwell, Hamilton & Co. has not been assessed for taxation, but it is not stated that this has been intentionally done, nor does the bill negative that this may have been an accidental omission, and hence makes no case entitling the plaintiff to relief against the payment of taxes in question.

It is, however, insisted that the bank cannot be made liable in respect of the taxes on the shares, and that the collector ought to be restrained from making distress of the property of the bank. But the act of the State in terms provides that the taxes on the shares "shall be paid by the bank," and it is competent to make such a provision. *National Bank v. Commonwealth*, 9 Wall. 354; *Lionberger v. Rouse, supra.* Undoubtedly the bank could be made liable to pay such taxes by suit, and no reason is seen why the collection may not be enforced by distraint in the same manner as other taxes are collected. The demurrer to the bill is sustained and the bill dismissed.

*Decree accordingly.*

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BOWDEN V. SANTOS.

(1 Hughes, 158.)

*Transfer of stock to escape liability to creditors.*

Shareholders in a National bank, knowing it to be insolvent, transferred their shares for the purpose of escaping liability to creditors. *Held*, that as to such creditors the transfer was void.\*

(Circuit Court, Fourth Circuit, Eastern District of Virginia.)

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\*See *Magruder v. Colston* (44 Md. 349), *post*.

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Bowden v. Santos.

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**B**ILLS in chancery filed by Bowden, receiver of the First National Bank of Norfolk, to enforce the personal liability of defendants as owners of shares of stock in said bank.

*L. L. Lewis*, for plaintiff.

*Baker & Walke* and *W. H. C. Ellis*, for defendant.

HUGHES, J. The bill in this case is filed to set aside certain transfers of the shares of the capital stock of the First National Bank of Norfolk (of which the plaintiff is receiver), made by the defendant Santos, to the defendants Lamb and Williams, a few days before the suspension of the bank, in May, 1874. It also prays that Santos may be decreed to pay to the plaintiff the par value of the shares thus transferred.

As to the facts, the bank suspended on the 26th day of May, 1874, and is utterly insolvent. The defendants Santos and Lamb, at the time of its suspension, were directors, and for a long time prior thereto had been officers of the bank. The defendant Lamb was president up to a short time before its suspension. For some time before that event the bank had been in a critical condition, and it had been evident to the officers that its "suspension was a mere question of time." The defendant Santos, aware of the condition of the bank (it was the subject of frequent discussion by the directors), and anxious to relieve himself of liability as the holder of the stock in question, transferred in due form, on the books of the bank, to Lamb, nineteen of his shares on the 16th May, and his remaining twenty shares to Williams, on the 21st day of May, 1874.

At the time of these transfers both Lamb and Williams were insolvent, and have ever since been unable to respond to the demands of the creditors on account of these shares. At the time of the transfers there was already standing in the name of Lamb on the books of the bank over 200 shares of its capital stock. The receiver has been unable to make any thing out of either Lamb or Williams, on account of their liabilities to the bank.

On the other hand, Santos, at the time of the transfers, was, and is, a man of high standing and credit in business circles, and of large means. In his answer it is averred by Santos that the transfer of the shares was a *bona fide* transaction, and for valuable



consideration; but the allegation in the bill that Williams was insolvent, and unable to respond to the demands of the creditors on account of these shares, is not denied. It is abundantly established by the evidence in the case that the transfers were made to exonerate the defendant Santos from his liability as stockholder.

In his answer, Santos declares that he was never the purchaser or owner of the nineteen shares transferred to Lamb, and yet the testimony shows that he executed his note (which he has since been requested to pay) for these shares, and that they stood in his name on the books of the bank for a considerable number of months before he transferred them to Lamb.

The defense set up that these shares were formerly bought in by Lamb for account of the bank, and that it was agreed between them that if Lamb, acting for the bank, would buy the shares for the bank, he might place them in Santos' name, provided he would indemnify him, *i. e.*, take a transfer of the shares when it should be desired by Santos, is invalid. Under the provisions of the National Currency Act (Rev. Stats., § 5201), a National bank is prohibited from purchasing or holding its own shares. What is forbidden to be done directly the law does not allow to be done indirectly. Consequently the promise on the part of Lamb to take the shares when requested, if it could be sustained on any ground, under the circumstances of this case, certainly cannot be sustained on the ground upon which it is placed in the answer. It is founded upon an illegal agreement, and the case comes strictly within the ruling of the judges in the case of *Ex parte Walker*, 39 Eng. L. and Eq. 579.

Plain as these facts are, they are no plainer than the law of the case. Indeed, there is no serious defense set up against the prayer of the bill, except the technical one that a bill does not lie, no discovery being sought, and there being adequate remedy at law. Counsel for defense rely, as to the doctrine that there is no such thing as fraud *per se*, on *Davis v. Turner*, 4 Rand. 422, and as to jurisdiction of equity where no discovery is sought, on *Home Ins. Co. v. Stanfield*, 1 Dill. 424, and *Medyl v. Mayes*, 6 Rand. 658. But this is a case of trust, and equity has jurisdiction in all matters of trust. That the capital stock of an incorporated company is a trust fund for the payment of the debts, and is required by courts of equity to be honestly and faithfully regarded and handled, is settled by very many decisions of the courts of this country. I refer only to

*Wood v. Dummer*, 3 Mason, 308 ; *Upton, Assignee, v. Tribilock*, 1 Otto, 47 ; *Sanger v. Upton, Assignee*, id. 60 ; *Webster v. Upton, Assignee*, id. 71 ; *Nathan, Receiver, v. Whitlock*, 9 Paige (N. Y.), 159 ; 6 id. 337 ; see, also, 2 Story's Equity, § 1252. Any contract, especially among the officers of an incorporated company, involving the withdrawal of any portion of the capital stock from the reach of creditors, will not be tolerated by a court of equity. 6 Paige, 337 ; *Ex parte Bennett*, 27 Eng. L. and Eq. 572 ; *Ex parte Walker*, id. 576, etc.

In the case of *Nathan, Receiver, v. Whitlock*, 9 Paige, 159, the defendant, Whitlock, who had been a director of the company, transferred his stock to Brown, the president of the company, the latter giving his note, in place of Whitlock's, for the stock transferred. The company afterward failing, and Brown being insolvent, the receiver was allowed to recover of Whitlock the amount of his shares transferred to Brown. The court held the transfer of the stock to be a fraud upon the rights of the creditors, and ineffectual to relieve Whitlock of his liability, and that Whitlock, having been a director of the company, must be presumed to have known its situation, and had no right to shift from himself to an irresponsible person the liabilities of a holder of the capital stock transferred.

In *Upton, Assignee, v. Tribilock*, 1 Otto, 47, the Supreme Court says : "The capital stock of a moneyed corporation is a fund for the payments of its debts. It is a trust *fund*, of which the directors are the trustees. It is a trust to be managed for the benefit of its shareholders during its life, and for the benefit of its creditors in the event of its dissolution. This duty is a sacred one and cannot be disregarded. Its violation will not be undertaken by any just-minded man, and will not be permitted by the courts."

Again, in the case of *Sanger v. Upton, Assignee*, 1 Otto, 60, the law is laid down as follows : "The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnership. When debts are incurred, a contract arises with the creditors that it shall not be withdrawn or applied otherwise than upon their demands, until such demands are satisfied."

Again, in the case of *Webster v. Upton, assignee*, it is said (p. 71, Otto) : "The whole subscribed capital stock of a corporation is a

trust fund for the payment of creditors when the corporation becomes insolvent. . . . . The stock cannot be released, *i. e.*, the liabilities of the stockholders cannot be discharged, to the injury of creditors, without payment."

In Angell & Ames on Corporations (10th ed.), § 535, it is said that a solvent stockholder who has given a stock note for his stock, cannot, upon the insolvency of the company, or in contemplation of that event, even with the consent of the directors, transfer his stock to an irresponsible person and be discharged from liability. So, at section 623, it is said that, however strictly the personal responsibility imposed upon members of an incorporated company may be construed to be against creditors, one point is very clear, and that is, that no member can exonerate himself from his liability, and defeat the claims of creditors, by transferring his stock to a bankrupt.

Any other doctrine is offensive to the plainest and best settled principles of morality and equity. A man is estopped to deny the truth of his admissions that have been acted upon by others." He who is silent when he ought to speak will not be heard when he ought to remain silent." So, as Mr. Santos silently sat by and saw innocent persons contracting with the First National Bank of Norfolk, perhaps on the strength of his name appearing on the stock list of the bank, he will not be heard in a court of equity to say, against the just demands of creditors, that "he was never the purchaser or owner of the stock transferred as aforesaid."

The ground of the equitable liability of the members is the credit which the company has gained, as a corporation, on the promise of the individual members to raise a fund to enable the corporation to fulfill its engagements. Angell & Ames on Corporations (10th ed.), § 603.

To the same effect many authorities might be cited, but it is confidently believed that sufficient has been adduced to establish the conclusions that the transfers of the stock made by Mr. Santos were illegal and void, and that consequently the defendant Santos must be held liable for the par value of the thirty-nine shares of stock transferred to his co-defendants.

I will sign a decree requiring the defendants, or either of them, to pay the par value of the shares held by Santos before their transfer, with costs.

## CASE V. CITIZENS' BANK OF LOUISIANA.

(2 Woods, 23.)

*"Insolvency" of National banks — Transfers in contemplation of.*

The word "insolvency," as used in section 52 of the act of 1864 (13 Stat. at Large, 115; R. S., § 5242), making void all transfers, assignments, payments, etc., "made after the commission of an act of insolvency or in contemplation thereof," is synonymous with the same word as used in the Bankrupt Act, and means a present inability to pay in the ordinary course of business.

To make transfers, assignments, etc., void under said section 52, it is only necessary that the insolvency should be in the contemplation of the bank making transfers; the party receiving the transfers need not know of or contemplate such insolvency.

(Circuit Court, Fifth Circuit.)

**B**ILL in equity and which was submitted for final hearing and decree upon the pleadings, evidence and arguments of counsel.

*John A. Campbell, Thomas Allen Clarke, J. D. Rouse, and T. F. Case,* for complainant.

*Armand Pitot and M. M. Cohen,* for defendant.

Woods, Circuit Judge. The 52d section of the "Currency Act" (13 Stat. 115) declares that "all transfers of the notes, bonds, bills of exchange, or other evidences of debt owing to any association, or of deposits to its credit; all assignment of mortgages, sureties on real estate, or of judgments or decrees in its favor; all deposits of money, bullion, or other valuable thing, for its use, or for the use of any of its shareholders or creditors, and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof with a view to prevent the application of its assets in the manner prescribed by this act, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void."

Relying upon these provisions of the statute, the complainant, Charles Case, the receiver of the Crescent City National Bank, files this bill against the Citizens' Bank of Louisiana.

The bill, after averring the appointment of the complainant as receiver, alleges in substance that between the 1st day of December, 1872, and the 6th of February, 1873, the Crescent City Bank drew bills of exchange on F. de Lizardi & Co., of London, amounting in the aggregate to £26,501, 5s. 7d., each, being payable in sixty days after sight, and sold the same to the defendant, the Citizens' Bank. That afterward, about the 26th of February, 1873, the said Lizardi & Co., having, after the acceptance by them and before the maturity of the bills, failed, the defendant demanded from the Crescent City Bank indemnity against loss on said bills, and for the purpose of such indemnity the Crescent City Bank transferred to the defendant promissory notes, bills and evidences of debt amounting to \$150,000, which were then and there the property of the Crescent City Bank. That at the time of the transfer, the Crescent City Bank had drawn and had negotiated for value bills of exchange on Lizardi & Co. to an amount largely exceeding its capital stock; that the bank had provided Lizardi & Co. with funds to meet the same at maturity; that by the failure of Lizardi & Co. the bills would be dishonored and the bank held liable therefor, and that the funds provided for the payment of said bills, had been then lost to the bank by reason of the failure of Lizardi & Co. and that by reason thereof and of other losses the bank was then insolvent; that its insolvency was known to itself and the defendant; that said notes, bills and evidences of debt were transferred to the defendant in contemplation of the insolvency of the Crescent City Bank, with a view to give preference to the defendant over other creditors. The bill prays that the transfer of said assets be declared void, and that defendant be compelled to account for them to the complainant.

The answer of the defendant, the Citizens' Bank, which is given under the common seal of the corporation, denies all the material averments of the bill, except that the Crescent City Bank had provided Lizardi & Co. with funds to meet the bills drawn on them; that by the failure of Lizardi & Co. the said bills would be dishonored and the bank held liable therefor, and that the funds provided had been lost to the bank at the time of the transfer to the defendant of said assets.

The complainant files the general replication.

In passing upon the case it is material to consider what it is necessary for the complainant to establish in order to render void

## Case v. Citizens' Bank of Louisiana.

the transfer of the notes, bills, etc., to the Citizens' Bank. The transfer must have been made after the commission of an act of insolvency, or in contemplation of insolvency, and with a view to give a preference to one creditor over another, or with a view to prevent the application of the assets of the bank in the manner prescribed by the Currency Act.

I know of no reason why a different meaning should be given to the word "insolvency" as applied to banks in the Currency Act, from the meaning given the same word in the Bankrupt Act as applied to traders.

"Insolvency, as used in the Bankrupt Act, when applied to traders does not mean an absolute inability of the debtor to pay his debts at some future time, upon a settlement and winding up of his affairs, but a present inability to pay in the ordinary course of his business; or in other words, that a trader is insolvent when he cannot pay his debts in the ordinary course of his business, as men in trade usually do, and such must be the conclusion even though his inability be not so great as to compel him to stop business. *Wager v. Hall*, 16 Wall. 599.

This definition of insolvency, in my judgment, is the meaning of the word in the Currency Act. It is only necessary that the insolvency should be in contemplation of the bank making the transfer. The party to whom the transfer is made need not know of or contemplate the insolvency of the bank which makes the transfer.

Thus it was held by Mr. Justice STORY, under the Bankrupt Act of 1841, that to constitute a conveyance "in contemplation of bankruptcy," it was not necessary that the professed creditor should know of the debtor's insolvency, or should co-operate with him to obtain a priority of payment. *Peckham, Assignee, v. Burrows*, 3 Story, 544.

The facts clearly established by the evidence and about which there seems to be no dispute, are as follows: Between December 2, 1872, and February 6, 1873, the Crescent City Bank had drawn bills on F. de Lizardi & Co., of London, which had been sold by the bank, and which were held as follows:

By the Citizens' Bank.....	£19,400
By the Canal Bank of New Orleans.....	5,500
By the State National Bank of New Orleans.....	5,000
By Eugene Kelly & Co.....	35,000

## Case v. Citizens' Bank of Louisiana.

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By Edward C. Palmer.....	£10,000
By Mr. A. Carriere.....	4,000
By Duncan, Sherman & Co .....	5,000

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and other bills held by other persons. So that at the time of the failure of the house of Lizardi & Co., there were bills outstanding drawn by the Crescent City Bank on Lizardi & Co., to the amount of £111,000. The failure of the house of Lizardi & Co., the drawers and acceptors of these bills, took place on February 14, 1873, before the maturity of any of the bills, and was positively known to Summers, the president of the Crescent City Bank, on the 16th inst.

By the transfer of notes, bills, and other evidences of debt, on February 26th, by the Crescent City Bank to the Citizens' Bank, the latter was fully secured, for the bills held by it, drawn on Lizardi & Co. by the Crescent City Bank, to the amount of £19,400. On March 13th, in consequence of the failure of Lizardi & Co., the circulation of the Crescent City Bank went to protest, and the bank has since been put in liquidation.

The Citizens' Bank lost nothing by the failure of the Crescent City Bank, having been fully secured for the bills held by it on Lizardi. The Canal Bank, Eugene Kelly & Co., Palmer & Carriere, received no security on all payment of the bills held by them amounting to £54,500. The capital stock of the Crescent City Bank was \$500,000.

These facts show the commission of an act of insolvency by the Crescent City Bank, the insolvency of the bank, the transfer of notes, bonds, etc., and the preference of one creditor to another.

These facts alone do not, however, make the transfer void. It is necessary to the complainant's case to establish two additional facts: 1. That the transfer was made in contemplation of the insolvency of the Crescent City Bank, and 2, that it was made with a view to give a preference to the Citizens' Bank over other creditors, and to prevent the application of said assets in the manner provided by the Currency Act.

If the complainant had established these facts in addition to those already stated, he has made out the case averred in his bill.

In passing upon the first point, it is pertinent to inquire, Was the Crescent City Bank really insolvent at the time of the transfer of the notes, bills, etc., to the Citizens' Bank, on the 26th of February, 1873?

We have, in evidence, a report of the condition of the bank on the 14th of February, 1873, the very day that Lizardi & Co., of London, failed. On that day the resources are stated at \$1,545,854.51, in which is included an item of \$561,958.01, under the head of "Other cash assets." This item is shown by the testimony of John Davis, the book-keeper of the bank, "to consist of a class of bonds, stocks, etc., which bonds amount to 90 per cent of the capital, which is \$564,000, the bonds are \$500,000, so that on account of \$564,000, they were \$500,000 bonds."

It is evident, from this statement, that this item of \$561,958.01 consisted mainly of the bonds of the United States to secure the circulation of the bank, with the premium thereon. It was not, therefore, a cash item; it was not available for the payment of the liabilities of the bank. The exhibit in which this item occurs, and the same item is found in the exhibits made on February 24th, February 28th and March 7th, was not a fair statement of the condition of the bank. This is made apparent by the fact, that among the liabilities of the bank, the capital stock is not set down as a liability to offset the bonds deposited to secure circulation, with the premium thereon.

The item, therefore, of \$561,958.01, should be stricken from the statement of the resources of the bank. This leaves the resources at \$983,896.50, on February 14th. On the same day, the liabilities of the bank are stated at \$973,303.12, showing an excess of resources over liabilities of \$10,593.38 only. But on the 14th of February, Lizardi & Co., of London, failed. On that day, as shown by the evidence of Davis, the exchange clerk of the Crescent City Bank, the amount of the bills outstanding drawn by the Crescent City Bank on Lizardi & Co., of London, was £111,000, which, reduced to dollars at the current rate of exchange at that time, would be about \$604,000. The bank had sent forward about \$606,000 to cover these drafts; these remittances were misappropriated by Lizardi & Co., and none of the \$604,000 of exchange drawn by the Crescent City Bank on Lizardi & Co. was paid by them. Here, then, is a bank which, on February 14th, shows resources over liabilities to the amount of only \$10,593, and, on that day, by the failure of Lizardi & Co., has withdrawn from its available resources, for an indefinite period, the sum of \$606,000, with the prospect of losing in the end a large portion thereof. This statement makes perfectly clear the "inability" of the Cres-



cent City Bank "to pay its debts in the ordinary course of business;" in other words, makes clear its insolvency. This loss or suspension of assets by the failure of Lizardi & Co. was greater than the available resources of the bank added to its capital stock, by more than \$95,000.

Summers, the president of the Crescent City Bank, must have known of this condition of affairs before the 26th of February. In fact he must have known it; it is impossible he should not have known it as soon as he heard of the failure of Lizardi & Co.

Reynes testified that "on the 15th of February he received a dispatch from Eugene Kelly, of New York, who held bills of the Crescent City Bank on Lizardi & Co. to the amount of £35,000, that the acceptances were due that day, and that they were unpaid, and that such dishonor was virtually the failure of the bank, and that he expected no preferred payments. Reynes showed the telegram to Summers, the president of the Crescent City Bank, and insisted on his acting according to it."

Faurie, the cashier of the Crescent City Bank, testifies that the remittances sent by the bank by Lizardi & Co., of London, to pay those bills, were misappropriated and therefore the bills came back. "When we found the remittances were misappropriated we thought it would break the bank."

"Some of the directors thought that if the remittances had been properly appropriated, they would come out all right; but if they had not been properly appropriated, they knew the bank had gone under. They said so. As soon as we were advised of the misappropriation of the remittances made by Lizardi & Co., of London, every officer of the bank knew that it was broken."

George Jonas, the president of the Canal Bank, testifies that as soon as it was known that the house of Lizardi & Co., of London, had failed, the credit of the Crescent City Bank was materially impaired, its business was diminished, there was urgency and anxiety among its creditors to obtain security. As soon as it was known that Lizardi & Co. had failed, every creditor wanted security if he could get it. He (Jonas) went to see Summers, the president, several times, to get security. Summers made an appointment to meet him on February 23d, and said he would bring bills receivable of a sufficient amount to cover the bills held by the Canal Bank. He failed to keep the appointment, but sent Jonas word, the next day, that his board determined to make no further

preferences, and declined to give any security whatever." He further testified that upon the failure of Lizardi & Co., the stock of the Crescent City Bank ran down rapidly, and he heard of parties who were anxious to get rid of it for nothing, on account of their liability as stockholders in case of a failure.

Edward C. Palmer testifies, that he was in commercial business in New Orleans, and was director in a National bank at the time of the failure of Lizardi & Co. He says that upon that event there was but one opinion expressed, that it could not do any thing else but ultimately break the Crescent City Bank. This was a general opinion among financial men that he talked with.

L. F. Generes, who had often been director of banks in New Orleans, testifies that immediately on the failure of Lizardi & Co., of London, there was great anxiety here about the Crescent City Bank from its relations with Lizardi & Co. It manifested itself some days after the failure was known. At first there was no anxiety, but still it grew up and became very urgent. The result of this evidence is that upon the failure of Lizardi & Co., of London, the Crescent City Bank was insolvent. As soon as it was known that Lizardi & Co. had misappropriated the funds sent to pay the bills drawn on them by the bank, the insolvency of the bank was known to its cashier and directors, and was currently rumored and suspected by the interested public. The board of directors, as early as February 22d, had "determined to make no further preferences." Here is the official act of the board of directors, which, in effect, implies the insolvency of the bank. Is it possible that Summers, a member of and president of the board of directors, and who himself reported this action of the board to Jonas, did not know of the insolvency of the bank? The "contemplation of insolvency" is in my judgment clearly established.

It remains to inquire whether the transfer of notes, etc., made on the 26th of February to the Citizens' Bank, in contemplation of insolvency, was made with a view to the preference of one creditor to another.

The fact is beyond dispute that the Citizens' Bank was preferred, because it was paid in full, while other creditors, similarly situated, were not paid any part of their claims. Did Summers, in making the transfer of notes, etc., do it with a view to a preference? The law presumes he had in view the natural result of his acts. But defendant claims to have shown that the transfer was made to

provide means to pay the bills drawn by the Crescent City Bank in London, and thus save the credit of the bank. Why, then, were not all the holders of the bills applied to to discount paper from the portfolio of the bank, and thus furnish the means, each to take care of his own bills. This arrangement was made with a part, but not with all. It was made with the Citizens' Bank and others. They were secured, and the bills held by them paid. The bills held by others were left unsecured, and were protested. How was the credit of the bank to be maintained by such a course?

E. C. Palmer, who held £10,000 of the bills of the Crescent City Bank, drawn on Lizardi & Co., heard of the failure of the drawers on February 15th, and within two hours went around to the bank. He saw Faurie, the cashier, who told him to go in and see Summers, the president of the bank. He found him talking with three or four of the directors. No offer was made to Palmer to transfer to him assets from the portfolio of the bank, in order to secure him. Doubtless he would have been willing to take care of the £10,000 of bills of exchange which he held, drawn by the Crescent City Bank on Lizardi & Co., if he could have been made secure out of the portfolio of the bank. So would the Canal Bank, and Eugene Kelly & Co., and Carriere. But no such opportunity was afforded them. These favors were reserved by Summers for the Citizens' Bank and others.

The truth is, as is evident by the testimony, that one at least of the purposes of the transfer of assets to the Citizens' Bank by the Crescent City Bank, was to secure the Citizens' Bank on the bills which it had purchased from the Crescent City Bank on Lizardi & Co. The pretense that this transfer was to sustain the credit of the Crescent City Bank is too transparent to deceive any one.

I am of opinion, therefore, after a review of all the evidence in the case, that the transfer by the Crescent City Bank to the Citizens' Bank, of the notes, bills, etc., mentioned in the bill of complaint, was made in contemplation of insolvency, with a view to the preference of one creditor to another, and is, therefore, utterly null and void.

Let a decree be entered as prayed in the bill.

## BIRD'S EXECUTORS v. COCKREM.

(2 Woods, 32.)

*Actions against receivers of National banks—Removal of, to United States courts.*

Receivers of National banks have not the privilege in all cases of being sued in the Federal courts, and are not entitled to remove causes against them from the State to the United States courts.\*

(Circuit Court, Fifth Circuit.)

**A**CTION against Cockrem, receiver of the New Orleans National Banking Association, for not surrendering property alleged to belong to the plaintiff.

The cause was heard upon the motion of defendant to vacate the order removing the case from the Fifth District Court of the Parish of Orleans.

*Messrs. J. Ad. Rosier and Geo. W. Race, for plaintiff.*

*Mr. J. D. Rouse, for defendant.*

BRADLEY, Circuit Justice. It is unnecessary to decide the question raised by counsel, whether the act of July 27th, 1868 (Rev. Stat., § 640), allows all corporations, or only corporations of the United States, when sued, to remove their causes into the United States courts, since banks of the United States are excepted in any case; and, also, since this is not a case against a corporation, but against a receiver, and the case is not within the 57th section of the National Banking Act (13 Stat. 116), which gives State courts concurrent jurisdiction with the courts of the United States, in suits against any association under the act, inasmuch as this is not a suit against the association. It is simply a suit against the receiver for not surrendering property alleged to belong to the plaintiffs. Now, unless a receiver, as such, has the privilege in all cases of being sued in the United States courts, I can see no ground for the removal of this cause from the State court. I am not aware of any such prerogative which a receiver of a National

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\* As to removal of causes by National banks, see *Chatham National Bank v. Merchants' National Bank*, 4 Thomp. & C. 196, *post*.

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bank has over other persons. Officers and agents acting under authority of the United States, in making arrests, seizures, etc., during the war, may remove all suits brought against them for such cause, into the United States courts. But this is not one of that class of cases.

The order for removal must be vacated, and the cause remanded to the State court.

## CASEY V. LA SOCI  T   DE CREDIT MOBILIER DE PARIS.

(2 Woods, 77.)

*Transfers of bank property in contemplation of insolvency — Rights of receiver — Contracts ultra vires — When bank estopped from repudiating*

To render a transfer by a National bank made after an act of insolvency, or in contemplation of insolvency, void, under section 52 of the act of 1864 (R. S.,    5242), it must have been made either with a view to prevent the application of the assets in the manner prescribed by the National Banking Act, or with a view to the preference of one creditor to another.

The preference of one creditor to another, mentioned in section 52 of the act of 1864, is a preference given to an existing creditor for a pre-existing debt; and does not refer to a case where one makes a loan to a bank and receives a concurrent transfer of property as security therefor.

The receiver of a National bank holds the same title to the assets of the bank that the bank itself held; and he has no greater rights in enforcing their recovery than the bank itself would have had.

A bank, being in an embarrassed financial condition, received a loan of money from defendant upon depositing with a certain commercial firm a portion of its assets as security. *Held*, that the fact that one of the members of such firm was president of the bank did not render the transaction illegal; and that the bank could not escape liability for such loan on the ground that the president had no authority to effect it where it appeared that it was effected with the knowledge of the directors, and the money was received and used by the bank.

A National bank which entered into a contract not authorized by its charter cannot repudiate the contract and at the same time retain its fruits.

**B**ILL in equity by Casey, receiver of the New Orleans Banking Association, to have certain transfers of the property of said bank declared void, and such property decreed to be surrendered up for administration.

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The case as presented by the pleadings and proofs was substantially as follows : On the 12th of July, 1873, the New Orleans National Banking Association, a corporate body organized under the National Banking Act, June 3, 1864 (13 Stat. 99), was engaged in the banking business in the City of New Orleans, and continued to carry on business until the 4th day of October, 1873, when it suspended payment. On the said 12th day of July, 1873, the defendant, "Soci t  de Credit Mobilier," of Paris, entered into an arrangement with the said banking association through Charles Cavaroc, Sr., its president, whereby the "soci t " agreed on its part to accept bills of exchange to be drawn by the banking association, payable ninety days after sight, to the amount of one million francs, and the association agreed to place with the soci t  ten days before the maturity of said bills the amount thereof. The banking association further agreed to deposit securities in the hands of the commercial firm of C. Cavaroc & Son, of which said Charles Cavaroc, Sr., was a member, for the purpose of securing the soci t  against loss from the failure of the association to place the amount required to meet said bills at maturity. The said firm of C. Cavaroc & Son was constituted by the soci t  its agent to receive and hold said securities.

In pursuance of this arrangement, on or about the 12th of July, 1873, bills of exchange were drawn upon the soci t  by the banking association at ninety days' sight to the amount of one million francs, and the same were sold by the banking association, and the proceeds, amounting to \$218,450.34, were appropriated by the banking association — were credited on its books to the soci t , and the bills were accepted by the soci t .

On the day of the date of the drafts, or the day following, a list was made out of notes due the association, amounting to \$220,021.43, and the notes named in the list were put in an envelope and handed to C. Cavaroc & Son, by direction of C. Cavaroc, Sr., the president of the association, to be held as security for the soci t , to protect it from loss by reason of its acceptance of the drafts.

It was subsequently stipulated by C. Cavaroc, Sr., on behalf of the association, that as soon as any of said notes matured, they should be replaced by others of like amount. Some time subsequent to the 12th of July, C. Cavaroc, Sr., fearing that the notes already set apart would not be sufficient to secure the soci t  for its acceptance of said bills, caused another list of notes, amount-

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ing to about \$100,000, to be made out, and the notes to be deposited with C. Cavaroc & Son, as additional security.

As notes matured and were paid or renewed, they were replaced by others, in pursuance of the agreement above stated.

The evidence showed that on the 12th of July the association was embarrassed; and that long before its suspension, on the 4th of October, it was insolvent.

When the banking association suspended payment, C. Cavaroc & Son claimed to hold all of said notes then in their hands, amounting to \$325,011.26, to secure the société for its acceptance of said bills.

After the suspension of the bank it was placed by the order of the Comptroller of the Currency, in the custody of John Cockrem, as receiver. Cockrem having resigned, the present complainant was appointed receiver in his stead.

The bill asks the court to adjudge and decree that all of the said notes held by C. Cavaroc & Son belong to and are the property of said banking association, and that the same, and all the proceeds thereof, be placed in the hands of complainant as receiver, to be administered and applied to the payment of the claims of the creditors of said association.

The bill is based upon the 52d section of the National Currency Act (Rev. Stat., § 5242), which declares as follows :

“ That all transfers of the notes, bonds, bills of exchange and other evidences of debt to any association, or of deposits to its credit, all assignments of mortgages, securities on real estate, or of judgments or decrees in its favor, all deposits of money, bullion, or other valuable thing for its use or for the use of any of its shareholders or creditors, and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by this act, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void.”

*J. D. Rouse and J. R. Beckwith*, for complainant.

*Thomas Allen Clarke, Thomas L. Bayne and Henry Benshaw, Jr.*, for La Societé de Credit Mobilier, of Paris.

*Edward C. Billings, John Finney and H. C. Miller*, for various other defendants.

WOODS, Circuit Judge. The claim of the complainant is that the alleged transfer of the notes and assets of the banking associa-

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tion of C. Cavaroc & Son, to secure the société for its acceptance of the bills of the association, was a transfer thereof in contemplation of insolvency, with a view to prevent the application of the assets in the manner prescribed by the National Currency Act, and with a view to the preference of one creditor to another ; that such transfer is therefore null and void, and that said notes are still the property of the association, and applicable to the payment of its debts.

It has been held by this court that to make "transfers, assignments, deposits and payments" void under the 52d section of the Currency Act, it is only necessary that the insolvency should be in contemplation of the bank making the transfer, and not that it should be known to or contemplated by the party to whom they are made. *Case, Receiver, v. The Citizens' Bank, ante, p. 276; Peckham, Assignee, v. Burroughs, 3 Story, 554.*

The evidence in the case satisfies my mind that the banking association, at the time it made the arrangement already recited with the société, to wit: on the 12th of July, 1873, was in an exceedingly embarrassed condition, if not actually insolvent. Although C. Cavaroc, Sr., its president, testifies that he did not at that time think that the bank was insolvent, he had abundant reason to know soon after that date that it was embarrassed and in a critical situation. This is evidenced by his application for assistance to other banks of the city of New Orleans. In my judgment the evidence shows so much clearly, but it does not show more.

But conceding that C. Cavaroc, Sr., the president of the bank, at the time he transferred the notes to C. Cavaroc & Son, for the security of the society, knew that the association was insolvent, will that fact render the transfer made under the circumstances recited void ?

That alone is not sufficient. One of two alternatives must exist: (1) It must be with a view to prevent the application of the assets in the manner prescribed by the Currency Act, or (2) with a view to the preference of one creditor to another.

Is it the meaning of the section of the Currency Act on which the bill is based, that after a National bank is in contemplation of insolvency, no person could do business with it except at the risk of having any means he may put under the control of the bank, no matter under what solemn contract for security, confiscated for the use of the general creditors of the bank ? If this is the con-



struction to be given to the 52d section of the Currency Act, then the moment a bank becomes embarrassed, it must give up and suspend payment, for all who come to its assistance must do so without security. In my judgment, the preference of one creditor to another, mentioned in the 52d section, is a preference given to an existing creditor for a pre-existing debt. If a customer or friend of a bank, knowing it to be embarrassed and in need of assistance, proffers it, for instance, a loan of \$50,000 in cash, in receiving security for the amount by a transfer of a part of its portfolio, that cannot be fairly construed as giving him a preference over other creditors. Other creditors are not injured by such a transaction, for the securities that such a creditor takes out, he leaves an equivalent in cash. He becomes a creditor solely on condition of receiving security. The policy of the law is plain, namely: to prevent preference among creditors holding pre-existing debts. It clearly was not the purpose of the act to forbid the bank from giving security to its friends for means to be advanced on the spot or in the future. The general creditors are not injured by such an arrangement; they may be greatly benefited by it.

Take the case in hand. Suppose the association were actually insolvent on the 12th of July. The société in effect puts one million of francs into the possession of the bank, and takes security for it. Is the general creditor any worse off? The bank had nothing when the securities were transferred. It gets dollar for dollar for what it transfers. Can that be called giving a preference to one creditor over another?

As claimed by counsel for defense, it is in effect an exchange of value rather than the giving of a preference to a creditor.

It seems to me to be established beyond all controversy by the evidence in this case, that the pledge of the notes of the association complained of was not made in contemplation of insolvency, but it was a struggle on the part of the officers of the bank to avoid insolvency; it was not made to give preference of one creditor over another, but it was a plan adopted by the bank to secure means to carry on its business with a view to be able to pay all its creditors.

The construction claimed by complainant for the 52d section of the Currency Act, would make the banks a trap in which the means of their friends, furnished on the pledge of securities, would be drawn in and applied to the payment of the general creditors. In

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my judgment the construction placed on the 35th section of the Bankrupt Act is applicable also to the 52d section of the Currency Act.

That section of the Bankrupt Act declares that any sale or other disposition of property made by a person insolvent, or in contemplation of insolvency, within six months before the filing of a petition in bankruptcy, by or against him, by any person who has reasonable cause to believe him insolvent, such sale being made with a view to prevent the property coming to his assignee in bankruptcy, etc., shall be void. Under this section it has been held that a sale made in good faith, for the honest purpose of discharging a debt, and in the confident expectation that by so doing the person could continue business, will be upheld. *Tiffany v. Lucas*, 15 Wall. 410.

So in *Cook v. Tullis*, 18 Wall. 332, it was held that an exchange of values may be made at any time, though one of the parties to the transaction may be insolvent; that there is nothing in the Bankrupt Act that prevents an insolvent from dealing with his property, selling or exchanging it for other property, at any time before proceedings in bankruptcy are taken by or against him, provided such dealings be conducted without any purpose to delay or defraud his creditors or give a preference to any one, and does not impair the value of his estate. And in *Tiffany v. The Boatmen's Institution*, 18 Wall. 376, it was held that a man really insolvent, but not having yet openly failed, and hoping to overcome his difficulties and to carry on his business, violates no provision of the Bankrupt Act by pledging his property for money lent, this money being lent at the time when the pledge was made. See, also, *Clark, Assignee, v. Iselin*, 21 Wall. 360.

On the strength of these authorities, construing a provision of the Bankrupt Act similar to the 52d section of the Currency Act, and upon my own independent judgment of what is the purpose and intent of said section, I am of opinion that the original transfer made by the banking association to the société of the assets mentioned was not void.

But the complainant insists that the transfer was void, because not made in compliance with the Code of Louisiana. It is claimed that the Code requires that when a negotiable instrument is pledged by a debtor it must not only be delivered to the creditor to whom it is transferred, but must be indorsed (Civil Code, art. 3123), and

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as it was conceded there was no indorsement of the notes in question, the attempted transfer was ineffectual to carry title.

There has been some confusion in the legislation of Louisiana upon this subject, so that it is not by any means clear whether an indorsement as well as delivery of a negotiable instrument is necessary in order to complete an act of pledge. The act approved March 15, 1855, entitled "An act relative to pledges" (see Fuqua's Civil Code, 421, note), appears to have been a re-enactment of the act of 1852 (see acts of 1852, p. 15). The first section of this act declares that when a debtor wishes to pawn promissory notes, bills of exchange, etc., he shall deliver to the creditors the notes, bills of exchange, etc., so pawned; and such pawn so made, without further formalities, shall be valid as well against third persons as against the pledgers thereof, if made in good faith. There can, it seems to me, be no doubt that the purpose of this section was to make the delivery of a promissory note without indorsement sufficient as an act of pledge.

But in a subsequent revision of the statute law of the State, the provision requiring indorsement was allowed to remain; so that we have in the same statute book an article declaring that indorsement as well as delivery is necessary to the pledge of a promissory note, and another article in effect declaring that indorsement is not necessary. In my judgment it is not necessary to determine in this cause whether indorsement is or is not essential.

The receiver holds only the estate and title of the bank in its assets. His title is the same as that of an assignee in bankruptcy. It will not be pretended that the bank could recover back the assets which it had pledged and delivered to the agents of the société because they were not indorsed, and at the same time hold on to the proceeds of the draft, for the acceptance of which the assets were pledged, unless there was fraud; and there was no fraud in this case.

An assignment in bankruptcy, like any other assignment, by operation of law, passes the rights of the bankrupt precisely in the same plight and condition as he possessed them, subject to all equities. *Mitford v. Mitford*, 9 Ves. Jr. 100; *Gibson v. Warden*, 14 Wall. 248; *Campbell v. Slidell*, 5 La. Ann. 274; *Mitchell v. Winslow*, 2 Story, 630; *Ex parte Dalby*, Lowell's Dec. 431.

There seems to be no reason why the position of receiver of an insolvent bank under the Currency Act is any better than that of

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an assignee in bankruptcy. If the receiver held the same title to the assets of the bank that the bank itself held, he cannot avoid a pledge which the bank could not avoid. He is not a third person in the sense of the Civil Code.

In the case of *Matthews v. Rutherford*, 7 La. Ann. 225, it was held that a notarial act of pledge or a written act registered in a notary's office is a formality which is necessary to protect the payee against third parties, but its omission is unimportant as between pledger and pledgee.

I am of opinion, therefore, that the failure to indorse the notes pledged by the bank is a defect of formalities in making the pledge of which neither the bank nor the receiver can take advantage.

It is further claimed by the complainant that C. Cavaroc, Sr., the president of the association, could not at the same time act as president and agent of the association and as the agent of the soci    .

It is true that the same person cannot sell as the agent of one and at the same time buy as the agent of another, and a contract made by one who acts as the agent of both parties may be avoided by either principal. See Story on Agency,    211, and note. Such a contract, made by a person acting as agent for two principals, involves an absurdity. But in this case the contract was made between the "soci    " and the "association," the latter acting through its president. But it seems to me clear that there was no legal obstacle, the contract having been made and being in force, to the turning over by the association, acting through Cavaroc, its president, of the assets in pledge to be held by the commercial firm of C. Cavaroc & Son. In fact, C. Cavaroc & Son were mere depositaries or stakeholders, and all stakeholders are agents for both parties.

It is further claimed by complainant that Cavaroc, the president of the banking association, could only act by authority of the charter or by vote of the directors in making the pledge of the assets of the association, and that no such authority is found in the charter or minutes of the board of directors. The minutes of the board of directors are evidence, however, that they knew what arrangement had been made between their bank and the "soci    ," and they approve it by voting a compliment to C. Cavaroc, Jr., by whose agency the arrangement had been made. The books of the bank showed that it had received a million of francs as the result of

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this arrangement. It is impossible that the directors should have been ignorant of these facts — they never repudiated the contract nor returned to the société the fruits of it. This is a ratification. The acts of a corporation evidenced by a vote, written or unwritten, are as completely binding upon it, and as full authority to its agents, as the most solemn acts done under the corporate seal, and promises and engagements may as well be implied from its acts and the acts of its agents as if it were an individual. Abb. Dig. on Corp. 579, and cases there cited.

A corporation which has received the benefit of a loan cannot avoid liability on a mortgage to secure its payment by denying the authority of those who contracted the loan on its behalf. *Bissell v. Railroad Company*, 22 N. Y. 258; *Bank v. Dandridge*, 12 Wheat. 70, 71.

It is claimed, lastly, by the complainant, that the contract between the banking association and the société was not legitimate banking business, and could not be lawfully carried out.

We are not cited to any clause in the National Currency Act forbidding such a contract, and can see no reason why the association might not lawfully make it. But conceding that the Currency Act, which is the charter of the association, did not authorize such a contract, it does not follow that the association can repudiate the contract and keep its fruits. Corporations have no right to violate their charters, but they have capacity to do so and to be bound by their acts when a repudiation of such acts would result in manifest wrong to innocent parties. *Bissell v. Railroad Company*, 22 N. Y. 258.

When it is a simple question of capacity to contract, arising either on a question of regularity of organization or of powers conferred by the charter, a party who has had the benefit of the contract cannot be permitted in an action founded upon it to question its validity. *Navigation Company v. Weed*, 17 Barb. 378; see, also, *Dispatch Line v. Bellamy Manuf. Company*, 12 N. H. 205; *Moss v. The Rossie Company*, 5 Hill, 137.

I am of the opinion, therefore, that even admitting that the business carried on under the contract between the association and the société was irregular, and not within the limits of legitimate banking, that, having made the contract and enjoyed its fruits, neither the association nor its receiver can demand to keep the money of the société, which was received by virtue of the contract,

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Commercial Bank of Cleveland v. Simmons.

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and require the société to deliver up the assets that were transferred to it in consideration of the contract.

Complainant further insists that the notes pledged by the association were changed from time to time, as they fell due, and others substituted in their stead, and that this renders void the pledge, at least so far as such substituted notes are concerned.

The evidence leaves no doubt on my mind that such substitution was made. In fact, it is admitted by defendant. But has the substitution the effect claimed by complainant?

The case of *Clark, Assignee, v. Iselin*, 21 Wall. 360, is a pointed authority to sustain the negative of this proposition, and settle this objection to the title of defendant conclusively against complainant.

I have gone over the grounds relied upon by complainant, to avoid the pledge and transfer of the assets of the New Orleans Banking Association to the Société de Credit Mobilier. I am unable to find that any of the grounds are tenable. In my judgment, the pledge of these assets was a good one to secure the société against loss by the failure of the association to comply with its contract, and the receiver is not entitled to the pledged notes or the proceeds, until the société has been made whole.

The bill must, therefore, be dismissed, and the injunction heretofore allowed dissolved.

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COMMERCIAL BANK OF CLEVELAND V. SIMMONS.

(10 Alb. Law Jour. 155.)

*National banks — Right to sue not controlled by Judiciary Act.*

*Held*, that the plaintiff, a National bank, had the right to bring suit in the United States Circuit Court of the district where the bank was located upon two notes indorsed to it by the payee, who was also a citizen of the State and resident of the district.

That a National bank does not sue by virtue of any right conferred by the Judiciary Act, but by virtue of the right conferred upon it by the act of 1864, authorizing and creating it, and which constitutes its charter, that having no right to sue under the Judiciary Act, the limitation in the 11th section, as to suits on indorsed notes and choses in action, does not apply.

(Circuit Court, Sixth Circuit, Northern District of Ohio.)

**W**ELKER, J. This suit is brought on two promissory notes, payable to the order of John G. Simmons & Co., and indorsed to the plaintiff.

The petition states that the plaintiff is a corporation existing under the laws of the United States, and does not state that the payee of the notes is not a citizen of Ohio.

The defendants, Thompson and Mills, demur to the petition, and assign three grounds of demurrer :

1st. That it appears on the face of the petition in each of said causes of action that the court has no jurisdiction of the defendants, or either of them, or of the subject of the action.

2d. That the plaintiff and its assignor are both residents of the State of Ohio, and of said district, and have no legal rights to bring suit against the defendants in this court.

3d. For other good and sufficient reasons, appearing in the face of the petition.

This demurrer raises two questions :

1st. Whether the plaintiff can sue in this court, being located in the State of Ohio, and in this district.

2d. Whether, under the Judiciary Act of 1789, and the limitation of the 11th section thereof, the plaintiff can sue in this court upon the promissory notes in the petition described, the assignor thereof to the plaintiff being a citizen of the State of Ohio, and of this district.

In order to dispose of the questions made it will be necessary to examine the provisions of the act of Congress to provide a National currency, etc., approved June 3, 1864, under which the plaintiff was organized, and also the act on the same subject, approved in 1863.

The 59th section of the act of 25th February, 1863, provides that "All suits, actions and proceedings, by or against any association under the act, may be had in any circuit, district or territorial court of the United States held within the district where such association was established."

The 57th section of the act of 1864 provides, "that suits, actions and proceedings against any association under this act may be held in any circuit, district or territorial court of the United States, held within the district in which said association may be established ; or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

It is claimed by the defendants that under this section, as amended, suits cannot be brought by National banks in the State in which they were established ; that it only applies to suits against such associations. That, it is true, would seem to be the provision of the section.

But the Supreme Court of the United States, in the case of *Kennedy v. Gibson and others*, 8 Wall. 498, has given a construction of these two sections that is binding upon this court.

Mr. Justice SWAYNE, delivering the opinion of the court, says : "The 59th section of the act of February 25th, 1863, provides that all suits by or against such associations may be brought in the proper courts of the United States, or of the State. The 57th section of the act of 1864 relates to the same subject, and revises and enlarges the provisions of the 59th section of the preceding act. In the latter the word *by*, in respect to such suits, is dropped. The omission was doubtless accidental. It is not to be supposed that Congress intended to exclude the association from suing in the courts where they can be sued. The difference in language of the two sections is not such as to warrant the conclusion that it was intended to change the rule prescribed by the acts of 1863-4. Such suit may still be brought by the associations in the courts of the United States. If this be not the proper construction, while there is provision for suit against the associations, there is none for suits by them in any court."

Again, in 10 Wallace, 605, *The National Bank of Boston* sued a State bank of the same State, in the Circuit Court of Massachusetts, and the action was maintained. This case recognizes the construction given to these sections by Justice SWAYNE by entertaining jurisdiction in that case. We may then regard the section as reading *by* or *against* and authorizing suits *by* or *against* these associations. It is claimed also by defendants that the 57th section only provides for suits under or authorized by the act. That is, for liabilities under the act.

This is not tenable. The words "under this act," refer to and apply to associations under the act, as descriptive of the *parties* authorized to sue or be sued, and not liabilities or causes of action.

We now come to the second question made, and one presenting a very important one, and about which there may well be difference of opinion. I have examined it with much care in order to arrive at a correct conclusion, and feel well satisfied at the conclusion to which I have arrived.



Suppose the plaintiff has the right to sue generally in this court, as we have determined, has it the right to sue on promissory notes assigned to it by a resident of this district?

I can find no adjudicated case under the banking law, settling this question. The 11th section of the Judiciary Act of 1789, after stating that Circuit Courts shall have jurisdiction in civil cases, etc., "in all cases where the suit is between a citizen of the State where the suit is brought and a citizen of another State," provides, "nor shall any District or Circuit Court have cognizance of any suit to recover the contents of any promissory note or other chose in action, in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents, if no assignment had been made, except in cases of foreign bills of exchange."

I find two cases in 9th Wheaton, decided by the Supreme Court under a similar question made, which arose under the charter of the old United States Bank.

In the first case, *Osborn v. The United States Bank*, 9 Wheat. 740, it is decided that the charter of the bank confers on the bank the right to sue in any Circuit Court of the United States. In delivering the opinion in this case, Chief Justice MARSHALL says: "The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts of any description, to sue on these contracts, is given and reassured by its charter, and that charter is the law of the United States. This being can acquire no right, make no contract, bring no suit which is not authorized by a law of the United States." Another case was decided at the same term of the Supreme Court, *The United States Bank v. the Planters' Bank of Georgia*, 9 Wheat. 905. This suit was originally brought by *The United States Bank v. The Defendant*, in the Circuit for the District of Georgia, upon notes payable to a citizen of Georgia, and indorsed and transferred to the bank. The defense set up was that the court had no jurisdiction under the 11th section of the Judiciary Act, or rather the limitation to it.

In delivering the opinion of the court, Chief Justice MARSHALL says: "We proceed next to inquire whether the jurisdiction of the court is ousted by the circumstance that the notes on which the suit was instituted were made payable to citizens of the State of Georgia. The words of the Judiciary Act (§ 11), are (he then

quotes the part of the act above quoted, being the limitation, and says): "This is a limitation on the jurisdiction conferred by the Judiciary Act. It was apprehended that bonds and notes given in the usual course of business, by citizens of the same State, to each other, might be assigned to the citizens of another State, and thus render the maker liable to a suit in the Federal courts. To remove this inconvenience, the act which gives jurisdiction to the courts of the Union, over suits brought by the citizen of one State against the citizen of another, restrains that jurisdiction where the suit is brought by an assignee, to cases where the suit might have been sustained had no assignment been made. But the bank does not sue in virtue of any right conferred by the Judiciary Act, but in virtue of the right conferred by its charter. It does not sue because the defendant is a citizen of a different State from any of its members, but because its charter confers upon it the right of suing its debtors in a Circuit Court of the United States.

"There is, consequently, scarcely a debt due to the bank for which a suit could be maintained in a Federal court, did the jurisdiction of the court depend on citizenship. A general power to sue in any Circuit Court of the United States expressed in laws obviously intended to comprehend every case, would thus be construed to comprehend no case; such a construction cannot be the correct one.

"We think, then, that the charter gives to the bank a right to sue in the Circuit Court of the United States without regard to citizenship."

Now let us examine the Banking Law itself under which the plaintiff was organized. Section 8 of the act of 1864 provides that every association formed pursuant to the provisions of this act, shall, from the date of the execution of its organization certificate, be a body corporate; \* \* \* by such name it may make contracts, sue and be sued, complain and defend in any court of law and equity as fully as natural persons; \* \* \* and exercise under this act all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security," etc.

Then follows in the same act (§ 57), already quoted, providing "that suits, actions and proceedings *by or against* any association

under this act, may be had in any circuit, district or territorial court of the United States held within the district in which such association may be established."

To ascertain the privileges and powers conferred upon these banking associations, these sections are to be taken and construed together. It seems to me that these privileges and powers, thus given in this act, are as broad and comprehensive as those given to the United States bank by its charter, and referred to in the case in 9 Wheaton.

It must be borne in mind that, in the Judiciary Act, the right to sue or be sued, mainly depends upon citizenship of the parties; that corporations are only allowed to sue or be sued in the Federal courts under the act, through the legal fiction of citizenship, arising from the presumption that such corporations are citizens of the State under whose laws they are created.

These banking associations, not being created by State laws, have no State citizenship growing out of the presumed residence of the stockholders.

Under the Judiciary Act, then, they have no power to sue in Federal courts, and must, therefore, derive it from the act creating them. Having no right to sue under that act, the limitation on the 11th section, as to suits on indorsed notes and choses in action, does not apply. The right to sue under that section and the limitation thereto go together, the one controlling the other.

If the matter of citizenship in reference to the National banks is dispensed with in favor of such banks, then what reason is there for the application of the limitation as to suits on assigned paper? That limitation is only attached to enforce the privileges of citizenship, and to prevent its abuse in bringing suits in Federal courts; and further, the banks, in purchasing notes, etc., do only what the law authorizes them to do.

I may then well say, as was said in the case in *Wheaton*: That the bank does not sue in virtue of any rights conferred by the Judiciary Act, but in virtue of the right conferred upon it by the act of 1864, authorizing and creating it, and which constitutes its charter.

The charter of the old United States Bank was but a law, as this general act is a law of the United States.

That the Judiciary Act does not control the right and power of these banks to sue in the Federal courts.

*The demurrer to the petition is overruled.*

## CITY NATIONAL BANK V. PADUCAH.

(5 Cent. Law Journal, 347.)

*Taxation of National bank shares — Injunction to restrain — Parties — Rate of taxation — Deductions for debts and real estate.*

A National bank is a proper party complainant to a bill in equity, to enjoin the collection of a tax upon its shares, assessed against its stockholders, if it be shown that the bank would be subjected to a multiplicity of suits, whereby its business will be interfered with, its credit impaired and its stock depreciated.

The remedy by injunction to stay the collection of a tax upon personal property may be invoked where the enforcement of the tax would lead to the multiplicity of suits, or where the law authorizing the tax is itself invalid.

Where, by the laws of a State, or municipality, different rates of taxation are imposed upon different classes of moneyed capital, such State or municipality may not tax the shares of National banks at the highest rate imposed upon any class, regardless of the proportion which that class bears to other classes; nor, upon the other hand, is it confined to the lowest rate imposed upon any class.

Where different rates of taxation are prescribed for different classes of "other moneyed capital," the rate imposed upon shares in National banks should not, as a general rule, exceed that imposed upon other moneyed capital of the same class, viz.: shares in State banks.

Where, practically, the entire banking capital of the State of Kentucky was exempted from taxation beyond fifty cents per share, and included in this enumeration, was a State bank in Paducah, the capital stock of which exceeded that of all the National banks located there, it was held that an ordinance imposing a tax of \$1.05 nominally upon all banks in the city, but from which the State banks had been adjudged exempt, was an unlawful discrimination against the National banks, and therefore invalid.\*

Where other moneyed capital than bank stocks was also taxed at \$1.05, but with a proviso that from the amount of this capital the entire indebtedness of the owner should be deducted before the assessment was made, and no such deduction was allowed where such capital consisted of shares in National banks, the tax upon such shares was held invalid.

The tax was also held invalid for the reason that no provision was made for deducting the value of real estate owned by the bank, which was thereby subjected to double taxation.

(Circuit Court, Sixth Circuit, District of Kentucky.)

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\* See *Lionberger v. Rouse*, ante, p. 41; *Hepburn v. School Directors*, ante, p. 113.

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City National Bank v. Paducah.

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THIS was a bill in equity against the city and a tax collector of Paducah, to enjoin the collection of a tax upon the shares of the complainant's bank. In 1867 the Legislature passed an act to tax the shares of National banks, and provided that the tax should not exceed the rate imposed upon the shares of banks organized under the laws of the State. The amount so assessed upon the State banks under the general laws of the State of Kentucky was fifty cents per share. Under this law complainant has for several years reported to the auditor the number of its shares and paid the tax thereon which was in lieu of all other taxes.

In 1871 the city of Paducah, under an amended charter passed that year, was authorized to levy and collect a tax at the rate of not exceeding two dollars and fifty cents per hundred dollars of property within the city limits made taxable by law for State purposes, and also upon all bank stock located therein incorporated under the laws of the State of Kentucky or of Congress. No steps were taken under this act until April, 1875, when the common council of Paducah passed an ordinance providing for the collection of a tax of one dollar and five cents on a share for the year 1875, and for all subsequent years at a rate levied by the common council for other taxation, which ordinance was made applicable by its terms to banks organized under the State law, as well as National banks. It was, however, by the courts of Kentucky, held invalid as to State banks. This tax was assessed for the year 1875, and the books placed in the hands of the collector, and this bill was filed to enjoin him from proceeding thereunder against the bank.

The other facts of the case, so far as they are material to the questions involved, are stated in the opinion of the court.

*Charles S. Marshall and L. D. Husbands*, for complainant.

*King & Gilbert and Campbell & Greer*, for defendants.

BROWN, J. Upon the threshold of this case we are confronted with the objection that, inasmuch as the tax in question is laid upon the individual shareholders, the bill cannot be maintained in the name of the bank; that the suit is one which concerns the stockholders only, and that they are the only proper parties complainant. Though this question has been raised before the Supreme

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Court several times, it has never been directly passed upon. In *Dows v. The City of Chicago*, 11 Wall. 108, the bill was filed by a stockholder simply upon the ground of the illegality of the tax. The bank itself filed a cross-bill, also alleging the illegality of the tax assessed, on various grounds; and averring that if the share were permitted to be sold, irreparable injury would only be done the shareholders, but also to the bank, which would be thereby subjected to great loss of standing and other injury, for the redress of which the law afforded no remedy; and that such also would be the result if the bank paid the taxes, and was subject to suits by each of the shareholders by reason of so doing; and that in either event a multiplicity of suits would be rendered necessary to adjust the rights of the parties. A demurrer was interposed to both bills, and both were dismissed; the original bill because it was based solely upon the ground that the tax was illegal, and the cross-bill because it must share the fate of the original. The court intimated, however, that if the cross-bill had been an original, with like averment, it might have been sustained to avoid a multiplicity of suits. The question appears to have been fully argued in *Tappan v. The Merchants' National Bank*, 19 Wall. 490,\* under an allegation in the bill similar to the one under consideration, and to have been ruled by the Circuit Court of Northern Illinois in favor of the jurisdiction. *Union National Bank v. Chicago*, 3 Biss. 82. In the Supreme Court the case went off on another point, and the court expressly declined to pass upon this question. The only case I have found in which the jurisdiction was denied is that of *The First National Bank of Hannibal v. Meredith*, 44 Mo. 500, where, notwithstanding the taxes were assessed on the bank, and sought to be collected by seizing and selling all the shares comprising the capital stock, the court declined to interfere on the ground that an injunction to restrain the collection of the tax was not the proper remedy, unless the sale of the property was accompanied by irreparable damage. Incidentally, the court remarked that the plaintiff had no equity, for the reason that its property was not in jeopardy; that the bank, as a corporation, would lose nothing if the shares of its stockholders were sold, and that its shareholders, if any one, were entitled to relief. The point, however, does not seem to have been maturely considered, and indeed it is doubtful whether the petition in that case, charging as it did not an impending multiplicity of suits, but that

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\* See *ante*, p. 100.

the sale of the shares would greatly damage the bank, by impairing its credit and stability and injuring the owners of the stock, by casting a cloud over the title and destroying its convertibility, made out a case for relief.

The bill under consideration alleges, and the evidence meets, substantially, the averment, that the city is threatening to sue the bank and each of its stockholders, in separate suits, and will, unless restrained, sue out attachment garnishing the bank and attaching the stock of the shareholders, involving the plaintiff in a great many petty suits, breaking down the business of the bank, depreciating its stock, bringing endless confusion on the ownership of the same, injuring the credit of the bank, putting a cloud upon the same, and doing it an irreparable injury. That if the bank pays these taxes, the stockholders will sue it; and, in either event, a multiplicity of suits will result. Upon the whole, I think the bank is so far the trustee of the stockholders, and the custodian of their dividends, that it is entitled to maintain the bill. It might be subjected to great annoyance by stockholders, who denied the legality of the tax, and gave the bank notice that it would pay it at the peril of being sued by them. It is certainly no hardship to permit the whole question to be litigated in a single action.

We assume in this connection that all the stockholders in this bank, each having the same ground for relief, and the same defense being applicable to all, might have united in a single bill without multifariousness. Cooley on Taxation, 545. This being so, we see no objection to the bank maintaining a like bill as trustee for the entire body of stockholders. We should feel inclined to go to the limit of the law in sustaining a practice so convenient, and, so far as we can see, so unobjectionable.

It is also insisted that a remedy by injunction cannot be invoked in this case. While it is freely conceded that a court of equity has no general power to restrain the collection of taxes for any irregularity of assessment or levy, or for overvaluation or unjust discrimination, and that to sustain a bill the case must be brought within some acknowledged head of equity jurisdiction, we think this exigency is met in either of the two following cases:

1. Where the enforcement of the tax would lead to a multiplicity of suits; or

2. Where the law authorizing the tax is itself invalid.

Upon the first ground the interference of a court of equity was

held proper in *Heywood v. City of Buffalo*, 14 N. Y. 534, and in *Dows v. City of Chicago*, 11 Wall. 108. The opinion in that case received the sanction of the Supreme Court of the United States. The second ground of interference was also recognized by the Supreme Court in the same case, approving *Cook County v. The Chicago, Burlington and Quincy R. R. Co.*, 35 Ill. 460. In the case of the same *Railway Company v. Frary*, 22 Ill. 34, speaking of exceptions to the general rule, that a court of equity will not interfere, it is observed: "Those exceptions are confined almost, if not entirely, to cases where the tax itself is not authorized by law, or if the tax is authorized, it is assessed upon property which is not subject to the tax. The case of *The Illinois Central R. R. Co. v. The County of McLean*, 17 Ill. 291, fell within the latter exception. The same rule is practically affirmed in *Munson v. Minor*, 22 Ill. 594, and *Center Warren Road Co. v. Black*, 32 Ind. 468. In *Warden v. Board of Supervisors*, 14 Wis. 618, an exception is mentioned of objections which go to the very groundwork of the tax assessed, so as to affect materially its principle and to show it must necessarily be illegal. "Where it appears that the established principle of taxation has been violated, and that actual injustice will ensue, or that the tax is levied for an unauthorized purpose, of course equity will interfere, in proper cases, to prevent the wrong." See High on Injunctions, 195-200. Both of the reasons above given for the exercise of equity jurisdiction are apparent in this case, and we think the complainant has not mischosen its remedy. While in a case of over-valuation or unjust discrimination an appeal to the supervising officers might correct the error, they would have no power in a case like this to question the validity of the ordinance by virtue of which the tax was assessed.

Coming now to the vital point in this case, viz., the validity of the legislation by which the tax in question was imposed, we find the general proposition firmly established, that banks organized under acts of Congress are regarded as fiscal agents of the government and are exempt from taxation, except as Congress may specially authorize it. *M'Culloch v. Maryland*, 4 Wheat. 316; *Weston v. City of Charleston*, 2 Pet. 449; *Farmers' Bank v. Dearing*, 9 U. S. 34.

In the organization of National banks, Congress has given a qualified authority for State taxation in the following section of the Revised Statutes:



SEC. 5219. " Nothing herein shall prevent all the shares in any association from being included in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the State within which the association is located ; but the Legislature of each State may determine and direct the manner and place of taxing all the shares of National banking associations, located within the State, subject only to the two restrictions, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State ; and that the shares of any National banking association, owned by non-residents of any State, shall be taxed in the city or town where the bank is located and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes to the same extent, according to its value, as other real property is taxed."

While the section in question would not be open to construction if the entire moneyed capital of the State, in the hands of individuals, were taxed at a uniform rate, the interpretation to be put upon it, where different rates of taxation are imposed upon different classes of moneyed capital, is not free from doubt. Has the State a right to tax the shares of National banks at the highest rate imposed upon any class of moneyed capital, regardless of the proportion which that class bears to other classes ?

On the other hand, it is confined to the lowest rate imposed upon any class of moneyed capital, with like disregard of the relative amount of the different classes ? The last question is answered directly, in the case of *Hepburn v. The School Directors*, 23 Wall. 480,\* in which it was proved that mortgages, judgments, recognizances and moneys owing upon articles of agreement for the sale of real estate were exempt from taxation in a certain district, except for State purposes. This was held a partial exemption only, and it is said it cannot be the intention of Congress to exempt bank shares from taxation, because some moneyed capital was exempt." Suppose, however, there were in a certain district a very small amount of moneyed capital of one species, and a very large amount of another ; that the former was heavily taxed and the latter exempt altogether, would the municipality be authorized to tax the shares of National banks at the rate imposed upon the former ? Suppose, for example, that State banks, exempted from taxation, absorbed three-fourths of " the other moneyed capital " of a certain city, and the remaining one-fourth was heavily taxed, would it not be not only an unjust discrimination, but a mere evasion, to tax the shares of National banks at the rate imposed upon the tax quarter ?

\* See *ante*, p. 113.

The questions have never been definitely settled, but bearing in mind that the obvious intention of Congress was to permit taxation, but to inhibit unjust discrimination, it would seem that the answer would be easy. I regard the true construction to be this: That when by local legislation different rates are prescribed for different classes of moneyed capital, the rate imposed upon shares of National banks should approximate as closely as may be to the rate imposed upon other moneyed capital of the same or similar class, viz., shares of State banks. While this rule might be subject to qualifications in localities where the capital of State banks bore a very small proportion to other moneyed capital, and the exemption was intended as a bounty, I think it furnishes, as a general rule, a safe guide to the validity of the tax.

It is urged, however, that the course of legislation upon this subject repels the interference here drawn from the language of the section, and shows, affirmatively, that Congress intended to permit the States to discriminate in favor of their own banks, by repealing a proviso inhibiting such discrimination, originally annexed to the section in question.

The 41st section of the original act of 1864 (13 Stat. 112) provides that nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of personal property of said person or corporation, in the assessment of taxes imposed by or under State authority, at the place where such "bank is located, and not elsewhere; but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State; provided, that the tax so imposed under the laws of any State, upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the State where such association is located. Provided, also, that nothing in this act shall exempt the real estate of associations from either State, county, or municipal taxes, to the same extent, according to its value, as other real estate is taxed."

In 1868 a short act was passed (15 Stat. 34) not amending, but explanatory of the 41st section entitled "An act in relation to taxing shares in National banks." The language is as follows: "That the words 'place where the bank is located, and not elsewhere,' in section 41, etc., shall be construed and held to mean the

State within which the bank is located, and the legislature of each State may determine and direct the manner and place of taxing all the shares of National banks located within said State, subject to the restriction that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State. And provided, always, that the shares of any National bank owned by non-residents of any State shall be taxed in the city or town where said bank is located, and not elsewhere." The intent of Congress was manifest. A difference of opinion has arisen with regard to the meaning of the words, "place where the bank is located, and not elsewhere," and in some States the assessing officers were taxing the shares in the town or city where the bank was located, notwithstanding the owner lived in a different town or city in the same State. To define the meaning of these words was the sole object of the act of 1868. This is evident not only from the language of the act itself, but is an actual fact — though possibly it is not a legitimate argument here — as appears from the remarks of the chairman of the committee which reported the bill. (See *Congressional Globe*, 2d session, 40th Congress, p. 921.) The two provisions in the original act were neither of them alluded to in the act of 1868, although out of abundant caution the words "the taxation shall not be at a greater rate than is assessed upon other moneyed capital" were repeated, and an entirely new proviso added, that the shares of non-residents should be taxed in the city where the bank was located. There is certainly no express repeal of the two provisos in the original act, and nothing from which an implication of repeal can arise. Were it not for the Revised Statutes, I should hold both the provisos in the act of 1864 to be still in force. I am aware that in the case of *Lionberger v. Rouse* (*ante*, p. 41), Mr. Justice DAVIS indicates an opinion, that under the act of 1868, the power of State taxation was subject only to the restriction that "the taxation shall not be at a greater rate than is assessed upon other moneyed capital;" but the point does not seem to have been argued, and was unnecessary to the decision of the case. In the revision, the second proviso, that the real estate of the bank should remain subject to taxation, is retained; while the first, limiting the tax expressly to the rate imposed upon the shares of State banks, was omitted. If there were any thing in the act of 1868 which could be construed as a repeal of the first proviso, I see no

reason why it should not operate also as a repeal of the second; but, as observed before, I think the two acts should have been construed harmoniously, and the restriction in the act of 1868 should not have been regarded as exclusive of those in the former act, while the omission of the first proviso in the Revised Statutes undoubtedly operates, under section 5596, as a repeal of such proviso, yet considering the manner in which the repeal was effected, I think no intent can be inferred on the part of Congress thereby affirmatively to permit States to subject the shares of National banks to a greater rate of taxation than they impose upon State banks, if any such intent could ever arise from the repeal of a prohibitory clause. So far as the question arising in this case is concerned, section 5219 should be construed precisely as if no prior legislation on the same subject had been had.

The ordinance of Paducah nominally imposed a tax of \$1.05 upon all banks within its limits, State as well as National, but as there is but one State bank in the city, viz., the Commercial Bank, which is exempt from taxation beyond fifty cents per share, and a possible tax of fifty cents on each hundred dollars of its contingent fund, which seems never to have been collected, the tax is really applicable only to the three National banks, the aggregate capital of which is less than the capital of the Commercial Bank. It is true an attempt was made to assess the same tax upon the Commercial Bank, but an injunction against its collection appears to have been granted and perpetuated by the State court. I feel authorized, then, to treat it as exempt from this tax. That the Commercial Bank is not exceptionally favored in this particular, is shown by the certificate of the Auditor of Public Accounts of the State, which is in evidence and exhibits a complete list of all banks doing business under the laws of Kentucky. They are fifty-three in number, having an aggregate capital of \$12,473,641.50, and each pays the State a tax of fifty cents on every hundred dollars of its capital, in lieu of all other taxes, though there are slight variations in the different charters. If there are any State banks, the taxation of which is not regulated by their charters, they fall within the general provision of chapter 92, article 2, section 1, "on bank stock, or stock in any moneyed corporation of loan or discount, fifty cents on each share thereof, equal to one hundred dollars." The result is the same in either case, a few apparent exceptions being set forth in the answer; but practically, the entire banking

## City National Bank v. Paducah.

capital of the State is subject to a tax of fifty cents per share of one hundred dollars, in lieu of all other taxes. If the city of Paducah may tax National banks at \$1.05 per share for the year 1875, it may increase the tax at any time to \$2.50, the amount authorized by the Legislature, and to as much greater an amount as the Legislature may hereafter see fit to authorize. (It was conceded upon the argument that the tax for 1876 had been increased to \$1.40.) Indeed, the Legislature may authorize like taxation by every municipality in the State, while the State banks, under their special charter, will escape their burden altogether. Certainly, here is a large discrimination in favor of State banks. I am not unmindful in this connection of the case of *Lionberger v. Rouse*, above cited, nor of the case of *Hepburn v. School Directors*, 23 Wall. 480, in which it was held that the exemption of small amounts of moneyed capital, in particular cases, would not invalidate the tax, if the great body of moneyed capital was subjected to it. In both these cases, however, the amount exempted was small in proportion to the aggregate amount of moneyed capital, and the great mass of moneyed property was subjected to the same tax levied upon the shares of National banks. It is true that the fifty-three State banks in Kentucky are not chartered by general law, but by special acts in each case; but this seems to me to make no difference. The fact remains, that, practically, the entire banking capital of the State pays a tax of fifty cents, in lieu of all other taxes, even upon its real estate. The law will look, not at the manner in which the tax is imposed, but at the result of the system. A like answer may be made to the argument that many of these State charters have expired, and that in renewing them the power to increase the taxation is reserved. This power never seems to have been exercised.

It is insisted, however, that although the legislation in question may discriminate in favor of State banks, there is no discrimination against National banks, inasmuch as "all other moneyed capital, in the hands of individuals," except shares in State banks, pays the same tax. Under the general laws of Kentucky (and the charter of Paducah adopts the same rule of assessment) property subject to taxation is listed in five classes :

1, Real estate ; 2, horses, mules and the like ; 3, cattle ; 4, watches, plate, clocks, pianos, vehicles and harnesses ; 5, "the assessor, after having taken the lists of all property required to be

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taken, listed as above, shall require each person on oath to fix the amount he or she is worth from all other sources on the day to which said list relates, after taking out his or her indebtedness from said amount ; and the said assessor shall take from the said amount the sum of one hundred dollars, and list the balance for taxation." This section includes all property not exempt or previously mentioned, such as spirituous liquors, the produce of mines, farms, forests, manufactures, notes, accounts, bonds, bills of exchange and choses in action, debts and demands of every kind, but does not include bank stock. The whole amount of this fifth class, in which "other moneyed capital" is included, in the city of Paducah, is shown by the assessors' books to be in all \$303,865. From this must be deducted all which is not moneyed capital. The residue, consisting of money on deposit, notes, bonds, mortgages, judgments and other choses in action, is the only "other moneyed capital," and the amount of this it is impossible to ascertain, as it is nowhere listed or taxed as such. A liberal estimate would probably not place it over \$200,000. Upon this the tax of \$1.05 is imposed, subject, however, to a deduction of all the indebtedness of the tax payers. If, then, the property of the tax payer consists of National bank stocks, purchased by him and for which he has given his note for the full amount, he pays, notwithstanding, the tax of \$1.05 per share ; but if his property consists of any other moneyed capital, and his debts are equal to the value of the capital, he pays nothing. It is true exact uniformity can never be attained, but the law requires at least an approximation to it, else the proviso in the Revised Statutes is useless. While the tax is legal, if laid at the same "rate" as other moneyed capital is taxed, and it may be said to be uniform if the rate is uniform, yet uniformity of rate presupposes uniformity of valuation. If, for instance, State bank stocks were appraised at their par value and National bank stocks at their cash value, there would be no real uniformity of rates, though the percentage might be the same in both cases, since the cash value might be half or double the par value. This principle is recognized in the *Railroad Tax Cases*, 2 Otto, 611, where the tax was sustained upon the ground that the rate imposed on railroad property was no greater than that upon other property, and the valuation was assessed upon the same principle which was applied to the property of indi-

viduals. Although by the term "moneyed capital," in section 5219, is meant taxable moneyed capital, yet this must be understood only as distinguishing a class of capital which is taxable from another, which, from motives of public policy, is exempt. All moneyed capital listed under the fifth subdivision of the equalization law belongs to the class of taxable moneyed capital, made the basis of comparison in section 5219 ; but if in the hands of "A" this capital is taxed, and in the hands of "B" it is not taxed, because he is in debt to its full value, like discrimination should be made if this capital consists of National bank stock, or the tax is not uniform. The Legislature may discriminate among different classes of capital without violating the requirements of uniformity, yet as between individuals of the same class the burden must be laid equally. It cannot tax A and exempt B, if the property is of the same class. Now, the act of Congress classifies National bank stock with other taxable moneyed capital, and inhibits discrimination against it and in favor of other moneyed capital. If a deduction of debts is allowed in one case, it should be in the other, or there is no uniformity.

Nor is this discrimination likely to work a hardship, only in rare instances. Most business men, among whom bank stock is principally owned, are more or less indebted, and the system which permits the debts of one to be deducted and not those of another, can hardly be said to be uniform. It is true the deduction of this indebtedness may be practically impossible so long as the shares of banks are listed under the equalization law above quoted ; but this is an argument to show, not that the tax is uniform with that levied upon other moneyed capital ; but that the rule announced earlier in this opinion, that the taxation of National banks should conform to that of State banks, is the only one under which taxation can be practically and uniformly imposed.

Another want of uniformity exists in the fact that no provision is made for the deduction of the value of real estate from the aggregate value of the shares. The laws of Ohio, and it is believed of other States, require the appraised value of the real estate to be deducted from the actual total value of the shares before they are listed for taxation. Without such provision, a double tax is paid upon the value of the real estate, from which other moneyed capital is exempt.

I lay no stress upon the deduction of one hundred dollars,

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allowed by the equalization law, or upon the fact that shares owned by colored people may be taxed for the support of common schools in violation of the law applicable to other moneyed capital. These exemptions fall within the rule laid down in *Hepburn v. School Directors*, and *Everitt's Appeal*, 71 Penn. St. 216 (see *post*); and do very little to disturb the practical uniformity of the law. *De minimis non curat lex*.

But from whatever point of view this case is considered, the fact is apparent, that by the ordinance of Paducah a large tax is imposed upon the shares of National banks, from which the banking capital of the State is wholly exempt; and though the percentage is nominally the same, the tax is far more onerous than that laid upon other moneyed capital in the city. For these reasons it seems to me the legislation is in conflict with the act of Congress, and therefore invalid.

A decree will be entered perpetuating the injunction.

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CANFIELD V. THE STATE NATIONAL BANK OF MINNEAPOLIS.

(1 Northwestern Reporter, 173.)

*National banks may take stock as collateral security.*

A National bank loaned money and took stock in a corporation as collateral security therefor. *Held*, that it had not exceeded its powers.\*

(Circuit Court, Eighth Circuit, District of Minnesota.)

IN this cause a motion is made for an injunction, and is heard upon bill, and answer used by defendants as an affidavit, and a counter affidavit.

The allegations in the bill of complaint are briefly, that the complainant is the owner of about sixty-five acres of land in Hennepin county, in this district, of which he is in possession, and that the defendants claim some interest therein adverse to him, and he de-

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\* See *First Nat. Bank of Charlotte v. Nat. Exchange Bank*, ante, p. 124; and *Shoemaker v. Nat. Exchange Bank*, ante, p. 169.



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sires that the respective claims may be litigated. He states that the Minnesota Agricultural and Mechanical Association was organized in June, 1871, as a body corporate, with a capital stock of \$40,000, represented by shares of \$50 each, all of which was taken by certain parties therein named, and that the corporation soon after its organization, purchased the land now in possession of the complainant, for the sum of \$10,000, and erected buildings upon the same of equal value. That the object of the association and the purpose for which the property was purchased and the buildings erected, were confined to holding fairs, of which one or two were held during 1871, and none since. That the real estate was placed under the control of William S. King, one of the stockholders, and a director, to be used by him as he saw fit, a majority of the stock being owned by him; and that prior to August 14, 1873, he had purchased and acquired the stock of the corporation, and that it had been transferred to him by the other holders and owners. Also that King had, prior to the above date, acquired the real estate in fee, and free from all claims and demands of the association, and of each of the other directors and former stockholders, with an obligation on the part of the association to make and execute a conveyance of the same to King, his heirs and assigns, or to such persons as he might designate as grantee.

The bill further states that the complainant contracted with King for the purchase of the real estate August 14, 1873, and the same was finally consummated and deeds were executed and delivered to him by King, and also by all of the directors of the association, but no delivery of any stock was made as he states on account of his forgetfulness and inadvertence in requesting it.

It also appears substantially in the bill, that Brackett, one of the directors, borrowed money of the bank in April, 1873, for which he gave his note and transferred as collateral to it, two hundred shares of stock of the Agricultural and Mechanical Association, and three promissory notes of William S. King, dated in November, 1872, for the payment of which the stock had been pledged; and also that R. J. Mendenhall, one of the directors of the association, borrowed money from the bank and gave his note, and transferred as collateral, one hundred shares of stock and certain notes of Wm. S. King, dated in 1872, for the payment of which the stock had been pledged.

It is charged that the bank has no title whatever or claim to the

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remaining five hundred shares of stock, and that it was never deposited as collateral, or pledged in any manner.

The maturity of the notes for which the shares of stock were pledged is alleged, and that the bank is about to sell them at public auction, having given notice thereof.

The answer of the defendant, the bank, denies the material allegation in the bill as above stated, but admits that it holds the three hundred shares of stock substantially as therein set forth, and also states that in July, 1873, King, owner of the five hundred shares remaining, borrowed certain gas stock, property of R. J. Baldwin, the cashier of the bank, to enable himself to raise a certain amount of money, and, in consideration of the loan, transferred the five hundred shares to Baldwin, as security for the return of the gas stock, and also to retain as additional security for the payment of the Brackett and Mendenhall notes, held by the bank.

It is charged that the security taken by the bank is in violation of law, and an injunction is asked restraining the sale of the stock by the bank.

*Palmer & Bell*, for motion.

*Geo. Bradley*, contra.

NELSON, J. The shares of stock held by the bank are a security not objectionable, in my opinion, to section 5136, Rev. Stat. (U. S.), par. 7. If so, the right to sell three hundred shares pledged as collateral to the King notes, originally given Brackett and Mendenhall, is not doubtful. A second pledgee holds the security to the extent of the debt for which it is pledged, and can sell at any time after the debt is due and payable. It is optional with the bank to stand to its remedy against the pledge or sue for its debt, and the law gave it the right to sell, *ex mero motu*, on proper notice of an intention so to do, or to file a bill in equity to foreclose and sell under a decree. Hilliard on Mortgages, vol. 2, Appendix, 526.

Although the King notes and the Brackett and Mendenhall notes had been overdue a long time, it is not deprived of this privilege given by law to select its remedy. It is charged that the bank has no title to the remaining five hundred shares of stock, and that the same have not been pledged or deposited with it as a collateral security for any sum whatsoever, or with any right to sell.

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The answer of the bank, which was used upon the motion as an affidavit, denies this allegation, and the counter affidavit and exhibits produced by the complainant do not overcome, but rather support the substantial claim set up in the answer by the bank to lien upon this amount of stock.

Applying the usual rule, on motions of this kind, the complainant's equity is not so clear as to entitle him to an injunction, for there is reasonable doubt as to the facts upon which the motion is based, and the injury resulting from a sale of the stock is not improbable. The purchaser would take only such title as the pledger had at the time the security was given, and the rule of *caveat emptor* will govern.

Having come to a conclusion adverse to the complainant's application for the reason stated, it is not proper to consider at this time the effect of the judgment set up in the answer as a defense in a case in which the parties are substantially reversed.

*Motion for an injunction denied.*

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PITTSBURGH LOCOMOTIVE AND CAR WORKS v. STATE NATIONAL  
BANK OF KEOKUK.

(2 Cent. Law. Jour. 692.)

*National banks may take pledge of chattels.*

National banks may take personal chattels (*e. g.*, a locomotive) as security for loans and discounts.

(Circuit Court, Eighth Circuit.)

**R**EPLEVIN for a locomotive engine. In July, 1873, the plaintiffs and the Miss. Valley & West. R. R. Co. (an Iowa and Missouri corporation) entered into a written contract, by the terms of which it "let" or leased to the railroad company the locomotive engine for nine months, for a sum equal to the value of the locomotive, one-fourth of which was paid at or near the date of the instrument, and the balance was to have been paid within the nine months. If paid, the plaintiff was to execute to the railroad com-

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pany a bill of sale; if not paid, the plaintiff "was to re-possess and enjoy the engine as though the instrument had never been made."

The instrument contained a stipulation on the part of the railroad company, that the said locomotive engine should be taken to Keokuk, Iowa, by the railroad company, and there kept and used and not removed from the control of the railroad company without the consent of the plaintiff.

The engine was sent to the railroad company, and was received by it at a town on its line in Missouri. While there, to wit, in September, 1873, said railroad company borrowed of the State National Bank of Keokuk \$1,250, and pledged the engine to the bank as security, placing the same in the actual custody of a third person for the security of the bank. The bank had no notice of the plaintiff's lease or claim on the locomotive, and the plaintiff's lease was never recorded. The question in the case is whether the pledge to the bank gives it the right to hold the locomotives as security for its loan to the railroad company as against the plaintiff.

At the date of these transactions there was in force in the State of Iowa the following statute:

"No sale or contract or lease wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser of the vendee or lessee in actual possession obtained in pursuance thereof without notice, unless the same be in writing, executed by the vendor or lessor, acknowledged and recorded the same as chattel mortgages." Code, 1873, § 1922.

*Howell & Anderson*, for plaintiff.

*Gillmore & Anderson*, for bank.

DILLON, Circuit Judge, orally said:

1. Conceding that the instrument of lease was executed in Pennsylvania, and that as between the parties it does not show a sale of the engine, and that, aside from the Iowa statute (Code 1873, § 1922), the plaintiffs would have the superior right, I am of the opinion, in view of the express stipulation of the contract, that the locomotive was to be taken to Iowa and there used by the railroad company; that the Iowa statute controls the case, and has the

## Crocker v. First National Bank of Chetopa.

effect to subordinate the rights of the plaintiffs to the lien of the bank as pledge. 2. I am furthermore of the opinion, that under the National Banking Act the bank had the right, on making the loan to the railroad company, to take a pledge of the locomotive as security. National banks are not, in my judgment, confined, in the taking of security for discounts and loans, to the security afforded by the names of indorsers or personal sureties, but may take a pledge of bonds, choses in action, bills of lading, or other personal chattels. The words "loans on personal security," in the Banking Act, are used in contra-distinction to real estate security. Such has been the usage of the banks, and any other construction would throw a bombshell into the community, and injure both the banks and their customers.

*Judgment for defendant.*

## CROCKER, assignee, v. FIRST NATIONAL BANK OF CHETOPA.

(3 Am. Law Times Rep. [N. S.] 350.)

*Revised Statutes, §§ 5197, 5198, construed — Rate of interest — Right of action to recover back illegal interest passes to assignee in bankruptcy — Extent of recovery.*

A National bank located in Kansas charged and received interest at the rate of eighteen per cent per annum. *Held*, that it was liable under the National Banking Act (Rev. Stats., §§ 5197, 5198) to pay back twice the amount of interest thus received.

If the person who paid such illegal interest is adjudged a bankrupt, the right of action passes to his assignee in bankruptcy, such assignee being his "legal representative" within the meaning of section 5198 of the Revised Statutes.

The amount of the recovery is twice the full amount of interest paid, and is not limited to twice the excess of interest paid over the legal rate.\*

(Circuit Court, Eighth Circuit, District of Kansas.)

THIS is an action by an assignee in bankruptcy, brought in 1875, to recover from the defendant, a bank organized under the act of Congress commonly known as the National Banking Act,

\* See, *contra*, *Hintermister v. First Nat. Bank* (64 N. Y. 212), *post*, and *Brown v. Second Nat. Bank* (72 Penn. St. 209), *post*, wherein it was held that the recovery was limited to twice the excess of interest paid. — REP.

double the amount of interest which he charges was taken from the bankrupts by the defendants upon numerous transactions after 1872 and prior to the bankruptcy. The petition charges in each count that the interest charged was "a greater rate of interest than was allowed by the laws of the State of Kansas."

It is material to inquire what was the law of the State of Kansas in regard to interest, during the period covered by the counts not barred by the statute. To properly understand the Kansas interest law, it is necessary to begin with the General Statutes, 1868, chapter 51, page 525, which contains the following :

"SEC. 2. The parties to any bond, bill, or promissory note, or other instrument of writing for the payment or forbearance of money, may stipulate therein for interest receivable upon the amount of such bond, bill, note, or other instrument, at any rate not exceeding twelve per cent per annum.

"SEC. 3. All payments of money or property made by way of usurious interest, or of inducement to contract for more than twelve per cent per annum, whether made in advance or not, shall be deemed and taken to be payments made on account of the principal, and the courts shall render judgment for no greater sum than the balance found due after deducting the payments of money or property made as aforesaid, without the interest; nor shall any debtor be deemed in equal wrong on account of having paid, or having agreed to pay, such usurious interest or such inducement, but shall have like remedy and relief in either case.

"SEC. 4. Any person contracting, by promissory note, bill of exchange, bond, or otherwise, to receive a greater rate of interest than that allowed by this act, shall forfeit all interest, and shall recover no more than the principal of such note, bill, bond, or other contract."

Those sections clearly limited the rate of interest to twelve per cent per annum, and punished the creditor who contracted for more with an entire forfeiture of all interest, at the same time rewarding the debtor with a credit upon the principal debt of so much as he might have paid for interest on a usurious contract. This remained the law until June 20, 1872, when sections 2, 3, and 4 quoted were repealed by the act of February 28, and the following took effect :

Laws 1872, p. 284. "SEC. 2. The parties to any bond, bill, promissory note, or other instrument of writing for the payment or forbearance of money, may stipulate therein for interest receivable on the amount of such bond, bill, note, or other instrument of writing; provided, that no person shall recover in any court more than twelve per cent interest thereon per annum.

"SEC. 3. All payments of money or property made by way of usurious interest or inducement to contract for more than twelve per cent per annum,

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whether made in advance or not, shall be deemed and taken to be payments made on account of the principal and twelve per cent interest per annum, and the courts shall render judgment for no greater sum than the balance found due after deducting the payments of money or property made as aforesaid."

A general denial was filed to the petition, a jury waived, and the cause tried by the court.

*McComas & McKeighan*, for plaintiff.

*John K. Cravens*, contra.

DILLON, Circuit Judge. The usurious transaction in respect of which this action is brought occurred after the State statute of June 20, 1872 (Laws of 1872, p. 284), went into operation. This statute, as construed by the Supreme Court of the State, "allowed parties to contract for any rate of interest they might choose, but did not allow the creditor to recover for more than the principal and interest at the rate of twelve per cent per annum." *Jenness v. Cutler*, 12 Kan. 511, per VALENTINE, J.

On the loans to the bankrupts, the defendant bank contracted for and received interest at the rate of eighteen per cent per annum. If the debtors had not been adjudged bankrupt, could they have recovered under section 30 of the National Banking Act? Rev. Stats., §§ 5197, 5198. If so, does this right of action pass to their assignee in bankruptcy? And if so, what is the extent of the recovery? These are the questions in the case.

1. If the effect of the State statute of June 20, 1872, was to abrogate all rates of interest; if after that enactment no rate of interest existed or "no rate is fixed by the laws of the State" of Kansas, then National banks would be restricted to seven per cent as the maximum rate they could lawfully charge. Rev. Stats., § 5197; *Tiffany v. National Bank of Missouri*, 18 Wall. 409 (*ante*, p. 90).

If, however, this was not the effect on that enactment, then twelve per cent is the maximum legal rate allowed by the laws of Kansas. In either event, the defendant bank charged and received an illegal rate. If bankruptcy had not supervened, it is clear that Marsh & Overhuls, the bankrupts, might, under the National Banking Act (Rev. Stats., § 5198), have recovered from the defendant bank twice the amount of interest paid, as therein provided.

Indeed, the right of action is yet in them if it is not barred by

the two years limitation (Rev. Stats., § 5198), unless it has passed to their assignee in bankruptcy.

2. The next question is, Is the assignee in bankruptcy their "legal representative" within the meaning of the statute? Rev. Stats., § 5198. It is our opinion that an assignee in bankruptcy is, in respect of such a claim as this, which has injuriously affected and reduced the estate in bankruptcy, and which is to be enforced "by an action in the nature of an action of debt," peculiarly and most appropriately "the legal representative" of the bankrupt. Every reason which in case of the death of the debtor, without bankruptcy, would give the right of action to the administrator or executor, as his legal representative, applies with full force to the assignee in bankruptcy, if his estate is, during his life-time, administered in a court of bankruptcy. See *Tiffany v. National Bank of Missouri*, *supra*; 1 Deacon on Bankruptcy (3d ed.), 523, 524; *Beckham v. Drake*, 2 H. L. Cases, 640.

In this view it is unnecessary to determine whether the right of action would vest in the assignee under the Bankrupt Act (Rev. Stats., §§ 5044, 5045, 5046, 5047), though it seems not improbable that the provisions of these sections are comprehensive enough to embrace it. *Darby's Trustees v. Boatmen's Sav. Inst.*, 1 Dillon, 141; S. C., 18 Wall. 375.

Under the English Bankrupt Act no right of action passes to the assignee for a mere personal tort to the bankrupt, as for assault or libel, but it is otherwise in respect of injuries or torts which result in diminishing the estate of the bankrupt; and the distinction is taken between rights of action where personal suffering or inconvenience is the primary cause of the action (which do not pass), and when pecuniary loss or damage is the primary cause of action, which do pass. 1 Deacon on Bankruptcy (3d ed.), 522 *et seq.* This distinction seems to be made in our Bankrupt Act, which vests in the assignee all such "rights of action."

3. The next question is, whether the recovery shall be for double the whole amount of interest paid, or only double the amount in excess of the legal rate, whether that be seven or twelve per cent? Where an illegal rate of interest is charged, and an action is brought on the contract, the statute declares a "forfeiture of the entire interest," and if the usurious interest has been paid, the statute gives an action to recover back, not simply the excess over the legal rates, but "twice the amount of interest thus paid," that is, paid in pursuance of an usurious contract or transaction.



## Wright v. The Merchants' National Bank.

National banks owe a duty to the public to observe the limitations of the act of Congress in respect of the rate of interest; limitations wisely imposed, but in many of the Western States, at least, very frequently disregarded. They have privileges enough, without usurping others. They have powers enough, without exercising those not conferred, or transcending the limits of their charters. They ought not to become usurers; and if they do, public policy is promoted by an enforcement of the penalties which the statute has denounced. It should be borne in mind that the statute confirms the action to the person who has paid the illegal interest, or to his legal representative, thus showing that it was in part its purpose to repair this loss or reimburse his estate — there being superadded the further purpose of preventing such violations of the law, the infliction of a penalty of twice the amount of interest paid. This penalty was, doubtless, supposed by Congress to be no more than would be reasonably sufficient to cover the excess of interest over the legal rate, and costs and expenses of litigation, and at the same time make it more profitable to the banks to obey the law than to violate it.

Judgment will be entered for the plaintiff for \$2,219.92, that being twice the full amount of interest paid on the usurious transactions set out in the petition, nor barred.

*Judgment accordingly.*

## WRIGHT V. THE MERCHANTS' NATIONAL BANK.

(3 Cent. Law Jour. 351.)

*Appointment of receiver of National bank by the court.*

The provisions of the General Banking Law for winding up National banks under the direction of the Comptroller of the Currency, are not exclusive and were not intended to oust the courts of their power to appoint a receiver upon a judgment-creditor's bill.\*

(Circuit Court, Sixth Circuit, Western District of Tennessee.)

**D**EMURRER to judgment-creditor's bill.

The bill sets forth in substance that complainant had recently obtained judgment of ten thousand dollars against defendant in

\* See *Irons v. Manufacturers' Nat. Bank*, ante, p. 204; also *Re Manufacturers' Nat. Bank*, ante, p. 192.

## Wright v. The Merchants' National Bank.

the State court; that she was unable to obtain payment of the same; that the bank had closed its doors, discontinued business, and was insolvent; and that, in contemplation of such insolvency, it had conveyed and transferred all its assets to one creditor, a correspondent bank in the city of New York, which was also a large stockholder in the defendant corporation; that this preferred creditor is appropriating all the assets to its own debt; that nothing will be left for the plaintiff, or can now be collected by legal process, and she, therefore, prayed for an injunction and receiver.

Demurrer was taken to the bill upon the sole ground, that under the provisions of the National Banking Law, a receiver could only be appointed by the Comptroller of the Currency.

*Messrs. Welsh, T. W. Brown and W. Y. C. Humes, for complainant.*

*Mr. Beard, for defendant.*

BROWN, J. The power and duty of a court of equity to appoint a receiver upon the application of a judgment-creditor, is too well established to admit of doubt. *Edwards on Receivers*, 396; *Hadden v. Spader*, 20 Johns. 553; *Taylor v. Jones*, 2 Atk. 600; *Edgell v. Haywood*, 3 id. 352; *Candler v. Pettit*, 1 Paige, 168; *Weed v. Pierce*, 9 Cow. 722; *Lewis v. Zouche*, 2 Sim. 388; *Bloodgood v. Clark*, 4 Paige, 574; *Ogilvie v. Knox Insurance Co.*, 22 How. 380; *Parkhurst v. Kinsman*, 2 Blatchf. 78. There is no allegation in the bill that execution has been issued and returned unsatisfied, but as no demurrer is interposed upon that ground, and as the point was not made upon the argument, I shall notice it no further.

Indeed, it was practically conceded that a case for a receiver was made out, unless the power of appointing receivers of National banks was exclusively vested in the Comptroller of the Currency. Title 62 of the Revised Statutes, relating to the organization of banks, provides for the appointment of a receiver by the Comptroller of the Currency to wind up their affairs, only in the following cases: First, for not keeping good a surplus. § 5151. Second, for not keeping stock at minimum. § 5141. Third, for not keeping good its reserve. § 5191. Fourth, for not selecting a place for the redemption of its notes. § 5195. Fifth, for holding its own stock over six months. § 5201. Sixth, for non-pay-

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ment of its circulating notes. § 5234. Seventh, for improperly certifying a check. § 5208. Eighth, for failing to pay up capital stock, and to allow the same to become, and to remain, impaired by losses. § 5205.

If a judgment-creditor may not invoke the aid of a court of equity he is powerless to enforce his claim, unless he can persuade the Comptroller of the Currency to interfere in his behalf. Section 5242 provides that a "transfer of notes, bills of exchange, bonds or other evidences of debt owing to any National banking association, or of deposits to its credit, all assignments or mortgages, sureties on real estate, or of judgments or decrees in its favor, all deposits of money, bullion, or other valuable thing for its use, or for the use of any of its shareholders or creditors, and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, made with a view to prevent the application of its assets in the manner prescribed by this chapter, or with a view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void." No method, however, is provided of winding up a bank guilty of any of the acts mentioned in this section, nor is the power given to the Comptroller of the Currency apparently designed to reach these cases. It is at least doubtful whether he would have power, upon the application made by this bill, to interfere and appoint a receiver. That the winding-up provisions of the act were not designed to be exclusive, it seems to me is fairly to be inferred from section 5241, which provides, that "no association shall be subject to any visitatorial powers other than such as are authorized by this title, *or are vested in the courts of justice.*" There is certainly an implication here that the courts *may* exercise a visitatorial power, and as this power is usually if not always exerted through the agency of a receiver, I should regard the language of this section as justifying the appointment of one.

But even if the power had been given to the Comptroller of the Currency to appoint a receiver in cases like the present, in the absence of restrictive language, it is at least doubtful whether it should be regarded as forestalling the jurisdiction of the courts.

The general rule with regard to the election of remedies is stated in Sedgwick on Statutory Law, pages 93-401. "Where a right originally exists at common law, and a statute is passed giving a new remedy without any negative, express or implied, upon the old

common law, the party has his election either to sue at common law or to proceed upon the statute ; the statutory remedy is merely cumulative." A clause in a railroad act authorizing the directors to exact a forfeiture of the stock and previous payments, as a penalty for non-payment of installments, does not, before forfeiture has been declared, impair the remedy of the directors to enforce payment by action at common law. *Northern Railroad Co. v. Miller*, 10 Barb. 260.

These principles have been applied to the winding-up act of English corporations, and have uniformly been held as not exclusive of the ordinary remedies provided by law. *Lindlay on Partnership*, 861.

In *Jones v. Charlemont*, 16 Sim. 271, a bill was filed for the purpose of winding up the affairs of a railroad company. The defendant demurred upon the ground that plaintiffs might have obtained their object under the special act of 9 and 10 Vict., to facilitate the dissolution of railway companies, and that that act had ousted the court of its jurisdiction in cases clearly within its operation. The vice-chancellor, however, declined to hear counsel for the complainant, and overruled the demurrer.

The same question again before the court in the case of *Clements v. Bowes*, 17 Sim. 167, which was a bill by a shareholder in a company on behalf of himself and others, praying an account of receipts and payments of defendants on behalf of the company. Defendants were members of a finance committee who were alleged to have exclusive control over the money affairs of the corporation. They demurred on the ground that the Legislature having provided a method of winding-up and dealing with the affairs of a railway company, the court ought to refuse to a party the right of coming to have the accounts taken. The court observes: "To oust the jurisdiction of a court of chancery in such a case, the Legislature should have so declared. It is plain where a court of equity has jurisdiction in such a case, an act of giving further relief does not by that oust the title of the court of equity, without express terms being used to put an end to the jurisdiction which is inherent in the court."

Similar views were expressed by the Court of Chancery in 1853, in the case of *Fripp v. The Chard Railway Co.*, 21 Eng. Law and Eq. 53, which was an application by a mortgagee for the appointment of a receiver. A provision in the act that any mortgagee whose

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interest was in arrears for twenty-one days might have a receiver appointed upon application to two justices, was held to oust the jurisdiction of the court to appoint a receiver with the usual powers. Counsel for defendant cited to the court upon the argument the case of *Smith v. Manufacturers' Bank*, 9 B. R. 122 (same case under name of *In re Manufacturers' Nat. Bank*, ante, p. 192), in which Judge BLODGETT, of the Northern District of Illinois, held that the Bankrupt Act was not intended to apply to National banks, and that the provision made by Congress for their winding-up, when insolvent, was exclusive. Although the two cases are not exactly analogous, the reasoning of the court in that case undoubtedly applies to the one at bar. Having intimated an opinion upon the argument before this case was cited, and that the winding-up provisions were not exclusive, I felt bound on hearing the case, in deference to the views of the learned judge, to withhold my decision until I had made a more careful examination of the law. From correspondence with him I am informed that he has modified, to some extent, the views expressed in that opinion, and that in the subsequent case of *Irons v. The Manufacturers' National Bank* (ante, p. 204), he appointed a receiver of the same bank upon the application of a judgment-creditor. He there observes: "It would seem that the Comptroller only has the right to appoint a receiver upon the existence of the facts which clothe him with that power, and that he rightfully declines to act in this case. I can see nothing in the law itself, nor in the decision of the courts upon the law, so far as they have gone, to exclude the idea that a corporation created as this is, under an act of Congress for certain specified purposes, does not come within the general provision of the law regulating the remedies of creditors the same as any other corporation, except where there are specific provisions to the contrary."

It is not intended in this case to decide whether the court would be authorized to appoint a receiver upon the happening of the contingencies authorizing such appointment by the Comptroller of the Currency. I am clearly of the opinion, however, that when the act does not provide for the introduction of the Comptroller, a judgment-creditor is entitled to the aid of a court of equity. I see nothing in the case of *Gibson v. Kennedy*, 8 Wall. 498 (ante, p. 17), which conflicts with these views. Nothing was decided in that case, except that it is for the Comptroller to determine when it is necessary to institute proceedings against the stockholders to enforce their

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personal liability, and whether a whole or part, and if a part, how much shall be collected. It is true there are certain *dicta* in the opinion which, literally construed, would indicate that creditors must, in all cases, seek their remedy through the Comptroller in the mode prescribed by statute, but I am satisfied the court did not intend that language to be of universal application, and that it should be limited to the facts before it. Nor is there any force in the objection that a receiver appointed by this court would be powerless to obtain possession of the surplus of bonds on deposit in Washington, for the redemption of its circulating notes. I cannot assume that the Comptroller of the Currency would refuse to comply with the order of a court having jurisdiction of the case.

On the whole, I am of the opinion that in the absence of action on the part of the Comptroller of the Currency, this court has the power to appoint a receiver upon the application of a judgment-creditor, subject, possibly, to his being superseded by the action of the Comptroller.

*The demurrer must be overruled.*

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### ST. LOUIS NATIONAL BANK V. PAPIN.

(3 Cent. Law Jour. 669.)

*Restraining collection of tax — Construction of statutes — Construction of National Banking Act — Missouri Revenue Act.*

Shares being taxable, and no excessive valuation being complained of, equity will not restrain the collection of the taxes, though the assessing officers may have arrived at a correct result by some erroneous method.

Where an act of the Legislature is susceptible of two interpretations, one of which will overthrow the act or make it unconstitutional, and the other will support the act and give it effect, the latter is to be adopted by the judicial branch of the government. This principle is one which commends itself to the Federal courts with great force, in all cases where they are called upon to expound and apply State legislation, and especially so where courts are asked to overthrow the revenue laws of the States.

By the section of the National Banking Act (Rev. Stats., § 5219) which permits the States to authorize all the shares held in National banks by any person, to be included in the valuation of his personal property, and to be assessed at the place where the National bank is located, subject to the restriction "that the taxation shall not be at a greater rate than is assessed

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upon other moneyed capital in the hands of individuals," Congress has limited the States to taxation upon the shares in National banks as distinguished from taxation of the banks *eo nomine* upon their property or capital. A State cannot evade the restrictions of the act by requiring the value of the property of the bank to be added to the value of the shares otherwise ascertained, and thus produce an unfavorable discrimination in the taxation of bank shares.

As regards National banks, section 35 of the Revenue Act of Missouri may be construed as intended to impose a tax upon the shares only in such banks as their actual cash value, to be estimated by the taxing officers upon an inquiry *inter alia* into the actual value of the property of the banks, so far as it imparts or confers a value upon the shares.

(Before Hon. JOHN F. DILLON, Circuit Judge, and Hon. SAMUEL TREAT, District Judge.)

THE National Banking Act permits all the States to authorize all the shares held in National banks by any person to be included in the valuation of his personal property, and to be assessed where the National bank is located, subject to the restriction (the only one here involved), that such shares shall not be taxed "at a greater rate than is assessed upon other moneyed capital in the hands of individuals." Rev. Stats., § 5219. The Constitution of Missouri requires all property to be taxed in proportion to its value. In the Revenue Act of the State of Missouri, approved March 30, 1872 (Wag. Stat., ch. 118), are the following provisions in respect to the taxation of property and shares in corporations.

Section 35 of this act provides as follows :

"Persons owning shares of stock in banks or any joint-stock institution or association doing a banking business, or any insurance company, whether fire, marine, life, health, accident, or other insurance, incorporated under or by any law of the United States or of this State, are not required to deliver to the assessor a list thereof ; but the president or other chief officers of such corporation shall, under oath, deliver to the assessor a list of all shares of stock held therein, and the names of the persons who hold the same, and shall also state the actual cash value of such stock and all the property belonging to such corporation. In estimating the value of such stock and property, the officer making the same shall estimate and include all reserve funds, undivided profits, premiums or earnings, and all other values belonging to such corporation, which cash value shall be assessed and taxed as other personal property. Insurance companies, or any corporations doing business on the mutual plan without capital stock, shall make like returns of the net value, and shall be assessed and taxed in like manner; private bankers, brokers, money brokers and exchange dealers shall in like manner make returns of all moneys

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or values of any description invested in, or used in, their business, which shall be taxed as other personal property."

SEC. 36. "The taxes assessed on shares of stock embraced in such list shall be paid by the corporations respectively, and they may recover from the owners of such shares the amount so paid by them, or deduct the same from the dividends accruing on such shares, and the amount so paid shall be a lien on such shares respectively, and shall be paid before a transfer thereof can be made."

Sections 37 and 18 and 120 of the act refer to the mode of proceeding to collect the taxes, and penalties for non-compliance with its provisions.

Six of the National banks located in St. Louis brought in this court bills in equity for an injunction to restrain the collection, amounting to \$158,772.53, levied for the year 1875, under the authority of the revenue laws of the State, upon the shares of the respective shareholders of the said banks. Answers were filed and proofs taken, and the cases were argued and submitted together.

*James O. Broadhead, Henry Hitchcock, Noble and Orrick, and M. B. Jonas*, for plaintiff.

*F. J. Bowman, Samuel Reber and G. A. Madill*, for defendant.

DILLON, Circuit Judge, TREAT, District Judge, concurring.

The bills do not allege that the State has taxed or attempted to assess any tax against any of the banks *eo nomine* in respect of property (other than real estate) owned by them in their corporate capacity. The only tax assessed by the State or under its authority, except a tax on the real estate, of which no complaint is made, is a tax upon the shares of the shareholders. It is not alleged in the bills, as a ground for injunction or relief, that the shares have in fact been valued for taxation at more than their actual cash value.

But the special ground of complaint is that the taxes in question are not authorized, and if authorized, are authorized by section 35 of the Revenue Act of 1872, above quoted, and that section that prescribes a mode of ascertaining and fixing the valuation of the shares (which mode the taxing officers of the State are bound to follow) in conflict with the permission given in the National Banking Act to the States to tax the shares, and which, if carried out, as it must be if any taxes whatever are levied under it, results necessarily as contended in taxing these shares more than the other moneyed capital in the State is



taxed, thus at once contravening the restriction in this respect contained in the act of Congress, and the provision as to equality of taxation contained in the Constitution of the State.

It is contended by the counsel for the banks that by the provision of section 35 of the Revenue Act of 1872, above given, the Legislature has provided for taxing the shareholders not only upon the value of their shares as such, but in addition to this, for taxing them through their shares upon all the property of the bank by commanding the taxing officers to "include" the value of all such property in the valuation of the shares.

It is probably a sound view of the Federal legislation as it stands (Rev. Stat., § 5219) that Congress has limited the States to taxation upon the shares in National banks, as distinguished from taxation of the banks *eo nomine* upon their property or capital, and if so, the States could not evade the restrictions of the act of Congress by requiring the value of the property of the bank to be added to the value of the shares otherwise ascertained, and thus produce an unfavorable discrimination in the taxation of bank shares. The question is, whether the Legislature of Missouri has done what the counsel for the banks assert.

It must be that the language of section 35 is not free from obscurity, and that has been quite manifest upon the argument before us, since it showed that the counsel for the defendant have put different constructions upon it. In reaching a conclusion the court must bear in mind certain established principles of construction. One is, that where an act of the Legislature is susceptible of two interpretations, one of which will overthrow the act or make it unconstitutional, and the other will support the act and give it effect, the latter is to be adopted by the judicial branch of the government. This principle is one which commends itself to the Federal courts with great force, in all cases where they are called upon to expound and apply State legislation, and with more than ordinary persuasiveness and cogency in cases in which these courts are asked to overthrow the Revenue Law of the State.

The court is of opinion that section 35, in respect of the valuation of the shares in National banks, does not necessarily require the construction which the banks put upon it. That is to say, it does not require the value of the property of the bank as a corporate entity, to be added to the value of the shares, and the whole to be divided by the number of shares, the quotient giving the

value of each share. But its requirement is to ascertain and tax the share at its actual cash value ; but in ascertaining that value, the officer is directed to regard and include in his estimate all reserve funds, profits, earnings, and other values. Why not ? These are important elements in the question of value, and they should be included in estimating the value of the stock. From these, indeed, the stock derives its principal pecuniary value. Suppose the direction to the taxing officers was to assess the shares at their cash value, without prescribing how that value should be ascertained. The cash value may be more or less than the par value, or more or less than the market value. The actual value of shares depends chiefly upon the capital, property and values owned by the bank. Any intelligent determination of the value of a share involves an inquiry into the assets and property of the bank.

The act did not intend to make the estimate of value fixed by the president of the bank conclusive. The duty of estimating the value is devolved on the officers of the State; and as respects National banks, the provision requiring the president of the bank to return the property of the bank and state its value, can and should be regarded as intended to supply the assessing officer with data to form a just and fair judgment as to the actual value of the shares. To this end, and to preclude controversy, the act directs "reserve funds, undivided profits, premiums or earnings, or other values belonging to the corporations," to be included in estimating the value of the shares. It does not seem to us that the act excludes from the consideration of the assessor the liabilities of the bank, since these must be taken into account, if the "actual cash value" of the stock and no more is to be ascertained and taxed. This view is confirmed by the next sentence, which requires corporations on the mutual plan "to make like returns of the net value," which would allow liabilities to be regarded in ascertaining the value of the assets to be taxed.

We do not think a fair construction of section 35 requires the assessing officers to exclude from their consideration the liabilities and actual instead of nominal value of the assets of the bank, in ascertaining the taxable value of the property of the bank, as one means of arriving at the value of the shares.

As respects National banks, our judgment is that the act of the Legislature can be fairly construed as intended to impose a tax upon the shares only in National banks at their actual cash value ; that

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such cash value is to be estimated by the taxing officers upon an inquiry *inter alia* into the actual value of the property of the banks, so far as this imparts or confers a value upon the shares, and that this is the purpose which should be judicially ascribed to the Legislature rather than a purpose to impose taxes upon an illegal valuation. The proofs do not show that the valuation of the shares by the taxing officers is excessive; at all events an excessive valuation in fact is not made an object of relief in the bills. Inasmuch as the shares are taxable, and no excessive valuation is complained of, equity would not restrain the collection of the taxes, even though the assessing officers may have arrived at a correct result by some erroneous method.

A decree will be entered in each case

*Dismissing the bill of complaint.*

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JOHNSON, Receiver, etc., v. LAFLIN.

(17 Alb. Law Jour. 146.)

*Shareholder's right to transfer shares in a National bank — Elements of a complete transfer — Certificates — Blank power to transfer — Registration of transfer — Rev. Stat., §§ 5139, 5141, 5201, 5251, construed.*

Under the National Banking Act, a shareholder has the right to make an actual and *bona fide* sale and transfer of his shares to any person capable in law of taking and holding the same, and of assuming the transferor's liabilities in respect thereto; and, in the absence of fraud, this right is not subject to a veto by the directors or the other shareholders.

Where such a sale of shares is made and the transfer entered on the books of the bank, the transferor ceases to be a shareholder, and is freed from liability in respect of such shares.

The provision of the National Banking Act (Rev. Stats., § 5139) that shares shall "be transferable on the books of the association," construed; and held not to give the directors the power to refuse to register a *bona fide* transfer of stock without some valid and sufficient reason for such refusal.

As between the seller and purchaser of shares in a National bank, the sale is complete when the certificate of the shares duly assigned, with power to transfer the same on the books of the bank, is delivered to the buyer, and payment therefor is received by the seller; and either the purchaser or seller may compel a registration of the transfer on the books of the bank, unless the bank has some valid and sufficient ground for refusing to register the transfer.

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The defendant Laffin, owning full-paid shares of stock in a National bank of which his co-defendant, Britton, was the president, employed a broker to sell the same in the market; the broker, without Laffin's direction or knowledge at the time, sold the same at the market value to Britton individually, and received in payment his individual check on the bank for the purchase-price, and delivered to the purchaser the share certificates assigned in blank, with blank powers of attorney thereon indorsed, authorizing the transfer of the shares on the books of the bank; subsequently, after the amount of the check had been collected, but on the same day, the president, without the knowledge of Laffin or the broker, directed the book-keeper of the bank to credit his individual account with the amount of the check which he had given for the shares, and to transfer the shares (the book-keeper inserting his own name in the blank power of attorney as attorney to make the transfer) to Britton, "trustee," not specifying for whom he was trustee, and charging the sum to the "sundry stock account" of the bank, all of which was done. The bank, although it had not committed any act of insolvency, was then insolvent, but this fact was not known by Laffin or the broker. *Held*, that, although the bank, or its officers for it, was prohibited from purchasing its own shares (Rev. Stat., § 5201), yet that Laffin having sold in good faith, without notice of the illegal purpose of Britton in buying the stock, or of his intended misappropriation of the funds of the bank in paying therefor, was not liable to pay back to the receiver the money received in payment of the shares.

(Circuit Court, Eighth Circuit.)

THE plaintiff is the receiver of the National Bank of the State of Missouri, appointed June 23, 1877, by the Comptroller of the Currency.

That bank suspended payment and closed its doors June 20, 1877.

The defendant Laffin had, for some years prior to May 16, 1877, been the owner of 85 shares of full-paid stock in that bank, but was not a director. The defendant Britton was the president of the bank.

On the 10th day of May, 1877, Mr. Burr, the president of another bank in which Laffin was a director, wrote a letter to a correspondent, who was the owner of stock in the National Bank of the State of Missouri, stating (without giving the grounds of his advice), "you had better sell your stock in that bank, because you can buy it back again at a profit if you wish to do so." Mr. Burr casually showed Laffin this letter and said, "Go do likewise." An election was to be held for directors on the 29th day of May, 1877, which it was supposed would give the stock a greater value in the market before the election than it would have after that event.

Acting upon this general advice of Mr. Burr, and without personal knowledge of the actual financial condition of the bank, Laffin, on the 16th day of May, 1877, authorized one Keleher, a broker, to sell in the market his 85 shares of stock. Keleher sold the same at private sale for \$5,037.50 to James H. Britton, who then was, and for some years had been, the president of the bank. Mr. Britton gave Keleher to understand that he was buying either for himself or a party whose name he did not disclose. Britton paid Keleher the \$5,037.50 by his individual check on the bank of which he was president, and Keleher thereupon delivered Britton the certificates assigned in blank for the 85 shares of stock, together with a blank power of attorney, indorsed thereon, signed by Laffin, authorizing the transfer of the stock on the books of the bank. The stock certificates contained this provision: "Transferable only on the books of the said bank in person, or by attorney on the return of this certificate, and in conformity with the provisions of the laws of Congress and by the by-laws which may be in force at the time of such transfer."

There were no by-laws on the subject of the transfer of stock. Keleher immediately presented Britton's check at the counter of the bank, and received thereon \$5,037.50, and deposited the amount in his own name with his bankers, the Messrs. Bartholow, Lewis & Co., upon whom he gave Laffin his own check for \$4,995 — being the proceeds of the sale to Britton less his commission of 50 cents per share. Keleher did not inform Laffin to whom he had sold the stock, and even declined to do so. Laffin did not actually know that it had been sold to Britton until some time afterward. Keleher supposed Britton was making the purchase for himself or for some other person, and did not know that he was buying it as "trustee for the bank." After Keleher had delivered the stock certificates for the 85 shares assigned in blank, with the blank power to transfer indorsed thereon, and had collected the check and had left the bank, but on the same day, Britton delivered the stock certificates, together with the blank powers of attorney signed by Laffin, to one E. Girault, the general book-keeper of the bank, with instructions to credit from the general funds of the bank, Britton's individual account with the amount paid for the stock, viz., \$5,037.50, which was done, and to charge the like amount in the books of the bank to "sundry stocks" account, and to transfer

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the 85 shares on the stock transfer book to "James H. Britton, trustee." Girault obeyed these directions. The transfer of the stock on the transfer book was accordingly made to "James H. Britton, trustee," not stating for whom he was the trustee. But in the stock ledger the transaction was entered in an account entitled, "James H. Britton, trustee for bank," meaning Britton's own bank. Girault, in making the transfer of the shares, filled in his own name as attorney in the blank powers of attorney signed by Laffin, and signed the transfer to Britton as trustee thus, "S. H. Laffin by E. Girault, attorney." Girault had actual knowledge at the time that this stock had been paid for in the manner hereinbefore stated. No new certificate of stock for the 85 shares were ever issued to Britton or any one else. Neither Keleher nor Laffin knew of the foregoing directions of Britton to Girault, nor what Girault did in respect thereto. Other stock to a very large amount was from time to time purchased from other persons by Britton and paid for in the same way, and transferred and entered in the same manner. No formal resolution of the directors appears authorizing this to be done, but directors knew of and assented to Britton's acts in this regard.

At the time of the suspension of the bank, June 20, 1877, there were, it seems, 4,599 shares of its own stock standing in the name of "James H. Britton, trustee," which had been purchased by him with the funds of the bank, under circumstances more or less similar to the purchase from the defendant Laffin.

All of the stock thus standing in the name of Britton, trustee, including that purchased from Laffin, was voted by him at the election of directors, held May 29, 1877. Britton had been for years the owner of a large amount of stock in the bank in his own name and right, and thus owned 1,542 shares when the bank suspended. Britton's credit was good at the time of this transaction, and there was nothing in the nature of the transaction—in the fact of the purchase, the amount or mode of payment or the price paid—calculated to awaken suspicion on the part of Keleher, that it was not a regular transaction on Britton's own account. Laffin did not receive more than the stock was then considered worth in the market. Laffin did not know that the bank was insolvent, and his firm continued to deposit money with it until it closed. Keleher testifies that he considered the bank "sound in

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all respects" when he made the sale to Britton. The bank had not at that time committed any act of insolvency.

This is a bill in equity by the receiver against Laflin & Britton, to compel Laflin to pay back the \$5,037.50; to set aside the transfer of the 85 shares of stock; to have Laflin declared to be still a stockholder in the said bank in respect of said shares, and to have Britton ordered to re-transfer the shares to Laflin on the book of the bank.

The bill as to Britton stands confessed. Laflin answered denying the material charges in the bill. Replication was filed and proofs taken. The cause is before the court on final hearing.

The following provisions of the National Banking Act, taken from the Revised Statutes, are those which more directly relate to the questions arising in this case:

SEC. 5139. The capital stock of each association shall be divided into shares of \$100 each, and be deemed personal property, and be transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of the association. Every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares, and no change shall be made in the articles of association by which the rights, remedies or securities of the existing creditors of the association shall be impaired.

Again, SEC. 5151. The shareholders of every National banking association shall be held individually responsible, equally and ratably, and not one for the other, for all contracts, debts and engagements of such association to the extent of the amount of their stock therein at the par value in addition to the amount invested in such shares. \* \* \* \* \*

SEC. 5201. No association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith, and stock so purchased or acquired shall within six months from the time of its purchase be sold or disposed of at public or private sale, or in default thereof a receiver may be appointed to close up the business of the association, according to section 5234.

SEC. 5204. No association or member thereof shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. \* \* \* But nothing in this section shall prevent the reduction of the capital stock of the association under section 5143.

SEC. 5152. Persons holding stock as executors \* \* \* or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, \* \* \* or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name.

SEC. 5210. Requires a full and correct list of all the shareholders to be kept subject to inspection of all the shareholders and creditors, and a verified copy of such list to be sent annually to the Comptroller of the Currency.

*Henderson & Shields*, for plaintiff.

*A. W. Slayback*, for defendant Laffin.

DILLON, Circuit Judge. The plaintiff is the receiver of the National Bank of the State of Missouri, appointed by the Comptroller of the Currency, June 23d, 1877, the bank having suspended payment three days before. Rev. Stats., § 5234. The defendant Laffin had, for some years prior to May 16, 1877, been the holder of full-paid 85 shares in that bank. At the date of the suspension of the bank the defendant James H. Britton was its president, and had been such for some years prior to that event. On the 16th day of May, 1877, Laffin sold through one Keleher, a broker, the eighty-five shares of stock to Britton, and delivered to him the share certificates, duly assigned in blank, with powers of attorney in blank thereon indorsed, to transfer the shares on the books of the bank. Laffin's broker, who effected the sale, understood that he sold to Britton individually, or to some unknown person for whom Britton acted, and he received in payment for the shares the personal check of Mr. Britton on the bank for \$5,037.50, which was immediately presented and paid. Laffin did not know until some time after the transaction who had become the purchaser of his shares. After the shares had been thus delivered and paid for by Britton's check and the money received, but on the same day, they were transferred in pursuance of Mr. Britton's directions by Mr. Girault, the book-keeper of the bank (by virtue of the powers of attorney from Laffin), to "James H. Britton, trustee," and at the same time the book-keeper credited Britton's individual account at the bank with the amount of his check given in payment for the shares, and charged the same amount to the "sundry stocks account" on the books of the bank. On the official stock register, the shares were thus made to stand in the name of "James H. Britton, trustee," without stating for whom he was trustee. On the stock ledger of the bank the transaction was entered in an account entitled "James H. Britton, trustee for the bank." Neither Laffin's agent, who negotiated the sale of the shares, nor Laffin himself, had any actual notice of the



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manner in which the transfer of the stock had been registered, nor that the funds of the bank had been thus used to pay for it, nor of the entries in respect thereto on the books of the bank. But of all these facts Mr. Girault, the book-keeper of the bank who made the entries, and who had inserted his name in Laffin's blank power of attorney to transfer the stock, had actual knowledge at the time.

This is a bill in equity by the plaintiff as the receiver of the bank, against Laffin and Britton, to compel Laffin to repay the \$5,037.50 (the amount of Britton's check for the shares paid by the bank), and to set aside the registered transfer of the 85 shares on the stock transfer books of the bank.

The case presents questions of grave moment concerning the rights of stockholders and creditors in National banking associations. And if the insolvency of the bank here in question is such as shall make it necessary to enforce the individual liability of the shareholders (Rev. Stats., § 5151), it is important to those shareholders who made no sale of their stock, to know who are shareholders with them liable to contribute to meet "the contracts, debts and engagements of the association." These questions principally depend upon the true construction of certain provisions in the National Banking Act to which we shall refer as we proceed.

Inasmuch as this act in express terms prohibits a National bank from thus becoming a "purchaser of the shares of its own capital stock" (Rev. Stats., § 5201), if Laffin had made a contract to sell his shares to the bank, or to its president for the bank, it is plain that such a contract would have been *extra vires*, and illegal, both as respects creditors and other shareholders, and the transaction could have been impeached by the bank in its corporate capacity, or by its other shareholders, even if the bank were still solvent and going on, or by the receiver as the officer appointed to wind up its affairs. *Re London, etc., Exchange Bank*, Law Rep., 5 Ch. App. 444, 452; *Great Eastern Ry Co. v. Turner*, Law Rep., 8 Ch. App. 149; *Currier v. Lebanon Slate Co.*, 56 N. H. 262. And although Laffin did not contract to sell his shares directly to the bank, or to the president for the bank, still, if, before the transaction was completed as to him, he had notice, actual or constructive, that the purchase was in fact a purchase for the bank, and paid for by the money of the bank, the transaction cannot stand, and the receiver may compel him to pay back the money thus received, and have him declared still to be a shareholder.

It would be easy to support these propositions by argument and by the authority of adjudicated cases, but they are so plain that it is not necessary to do so. But Laffin, or his agent, Keleher, did not deal with the bank or with the president with knowledge that the latter in fact intended to pay for the shares out of the moneys of the bank. Laffin was acting in good faith. Neither he nor his agent Keleher had any actual knowledge of Britton's purpose to turn these shares over to the bank, and to pay for them out of the funds of the bank. If Laffin can be charged with notice, it must be constructive notice, arising either, first, from the mere fact that he was a shareholder in the bank, or second, from the law imputing to him all the knowledge in this behalf which was possessed at the time by Mr. Girault, the book-keeper, who made the transfer of the shares on the transfer books of the bank under Laffin's blank powers of attorney, and who contemporaneously made the entries on the private books of the bank, which showed that Britton had been paid for the shares out of the general funds of the bank, and had acknowledged that he held the shares as the trustee of the bank.

The controlling question in the case is, whether Mr. Laffin is affected with constructive notice in one or the other of these modes. The solution of this question, in its turn, depends upon the nature and extent of the right of a shareholder in a National banking association to transfer his shares, and also upon the elements or requisites of a completed transfer, by which is meant such a transfer as shall release the transferor from liability to the bank, its stockholders and creditors.

In considering these questions our first proposition is that under the National Bank Act a shareholder has the unrestricted right to make an out-and-out *bona fide* and valid sale and transfer of his shares to any person or corporation, capable in law of taking and holding the same, and of assuming the transferor's liability in respect thereto.

The right to transfer shares in a corporation is usually recognized or given in express terms in the charter or constituent act, which also, not unfrequently, prescribes the manner in which the transfer shall be made. The capital stock of a corporation is invariably divided into shares of a fixed amount for the purpose, among others, of allowing it to be readily transferred. In an ordinary partnership the consent of all the partners to the admis-

sion or retirement of a member is necessary, and every such change involves the dissolution of the old and the formation of a new partnership. But in incorporated companies this is different. Indeed, it is one of the leading objects of an incorporated body to avoid the operation and effect of this doctrine of the law of partnership. Accordingly, in this country, shares in corporations are universally bought and sold without reference to the consent of the other shareholders.

The restrictions on the right *bona fide* to sell and transfer shares must be found in express legislative enactment, or in authorized by-laws. The National Banking Act (Rev. Stats., § 5139), by providing that shares shall "be transferable on the books of the association, in such manner as may be prescribed in the by-laws or articles of the association," recognizes the right of the shareholder to transfer his shares. There is nothing peculiar in this provision. A similar provision is found in nearly all the incorporating acts and charters in this country. The right to transfer is given or implied, in the section just referred to (Rev. Stats., § 5139), and that right the association cannot take away or defeat. It contemplates a transfer on the books of the association, and all that the association is authorized to do is to prescribe the manner in which the transfer shall be made on its books. There is here no limitation whatever upon the right of transfer, and none exist except such as is implied from the nature of the transaction, or from other provisions of the act. Another section (Rev. Stats., § 5201) prohibits the bank from dealing in its own shares. This implies a restriction on the shareholder from selling his shares to the bank itself, or to a known trustee for the bank. And a shareholder cannot transfer his shares colorably, and thereby cease to be a shareholder as respects creditors and other shareholders, who would be injured by such a transfer. There may also be an implied prohibition against the right to transfer shares to an infant or person not capable in law of assuming the liabilities, as well as enjoying the rights of the transfer or the shares in respect thereto, but we have no occasion to determine this point. Rev. Stats., § 5139; compare *id.*, § 5152, *Weston's case*, Law Rep., 5 Ch. App. 614, 621. And on general principles there may also be an implied prohibition against the transfer of shares to a pauper or man of straw, or insolvent person, for the fraudulent purpose of escaping liability, but this is a matter that need not be now considered.

Subject, however, to such prohibitions and limitations, the right of the shareowner to make an actual and *bona fide* sale and transfer of his shares to any person, capable in law of taking and holding the same and of assuming the liabilities of the transferor in respect thereto, is plainly deducible from the National Banking Act itself. But if any doubt could exist on this subject, it would be removed by the judicial decisions, construing the provisions of the Banking Act in this regard, and similar provisions in other legislative enactments.

In the *Bank v. Lanier*, 11 Wall. 369,\* arising under the National Banking Act, it was expressly held by the Supreme Court of the United States that the owner of shares in a National bank may transfer the same by an assignment and delivery of the certificates, and the transferee may compel the bank to register the transfer on its books. The learned justice who delivered the opinion of the court in that case, after speaking of the additional value given to this species of property by reason of its *transferable quality*, says: "Whoever in good faith buys the stock and produces to the corporation the certificates, regularly assigned, with power to transfer, is entitled to have the stock transferred," even if the transferor is the debtor of the bank. The duty of the bank to make the transfer in such a case is held to be a corporate duty, in respect of which the bank is liable for the wrongful acts and omissions of its officers.

It was urged in the argument at the bar, in the present case, that the provision that the shares should "be transferable on the books of the bank," gave the directors of the bank the power to approve or disapprove of any given transfer of shares, and to register or refuse to register the same, as in their judgment the interests of the bank or of the other stockholders might require. Such, however, is not the object of this very common provision in charters and acts of incorporation. The purpose of requiring a transfer on the books of the bank is, that the bank may know who are the shareholders and as such entitled to vote, receive dividends, etc., and for the protection of *bona fide* purchasers of the shares and of creditors and persons dealing with the bank. That such is the meaning of the provision in question, and that it does not restrict the right of the owner to transfer his stock or clothe the corporation with the power to refuse to register *bona fide* transfers,

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\**Ante*, p. 70.

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is settled beyond all question by numerous decisions in the English, and the Federal and State courts. *Black v. Zacharie*, 3 How. 483 ; *Union Bank v. Laird*, 2 Wheat. 390 ; *Webster v. Upton*, 1 Otto, 65, 71 ; *Bank v. Lanier*, 11 Wall. 369 ; *St. Louis, etc., Ins. Co. v. Goodfellow*, 9 Mo. 149 ; *Chouteau Spring Co. v. Harris*, 20 id. 382 ; *Moore v. Bank*, 52 id. 377 ; *Hill v. Pine River Bank*, 45 N. H. 300 ; *Re London, etc., Tél. Co.*, Law Rep., 9 Eq. 653.

The general subject of the right to transfer shares has been much discussed in the cases in England arising under the various Companies' Acts. Some of these acts give the directors express power to refuse to assent to or register transfers of shares, and some do not. The result of the English cases is that the directors cannot refuse to register a *bona fide* transfer of stock unless the power to do so is expressly given in the act of Parliament or the articles of association. The leading authority on this point is *Weston's case*, Law Rep., 4 Ch. App. 20. See, also, *Gilbert's case*, Law Rep., 5 Ch. App. 559. In *Weston's case*, Law Rep., 4 Ch. App. 20, Lord Justice PAGE-WOOD, in considering this subject, said :

" I have always understood that many persons enter these companies for the very reason that they are not like ordinary partnerships, but that they are partnership from which members can retire at once, and free themselves from responsibility at any time they please, by going into the market and disposing of and transferring their shares without the consent of directors or shareholders, or anybody, provided only it is a *bona fide* transaction ; by which I mean an out-and-out disposal of the property, without retaining any interest in them. But if it is desired by a company that such unlimited power of assignment shall not exist, then a clause is inserted in the articles by which the directors have powers of rejection of members. *Shortridge v. Bosanquet*, 16 Beav. 84, which went to the House of Lords, was a case of that kind. In the absence of any such restriction, I think it is perfectly plain that the Companies Act, 1862, in the 22d section gives a power of transferring shares. \* \* I think there is no such power given to the shareholders, and that the shares are at once transferable under the statute, unless something is found to the contrary in the articles of association. \* \* It would be a very serious thing for the shareholders in one of these companies, to be told that their shares, the whole value of which consists in their being marketable and passing

freely from hand to hand, are to be subject to a clause of restriction, which they do not find in the articles. And I may add that if we were to hold that such powers were vested in the directors it would be a very serious thing for them, and would impose upon them much more onerous duties than any which are really imposed upon them by this clause." In *Gilbert's case*, Law Rep., 5 Ch. App. 559, 565, Lord-Justice GIFFARD said: "I agree that according to *Weston's case*, and according to what I have always considered to be the law, there is no inherent power in the directors, apart from the provisions of the articles of association, to refuse to register a proper and valid transfer, if that proper and valid transfer is submitted to them."

And although there is express power to the directors to refuse to assent to or register a transfer, this power must be exercised in a reasonable manner and *bona fide*, and they must have some valid and lawful reason for refusing to register. *Ex parte Penny*, Law Rep., 8 Ch. App. 446; *Nation's case*, Law Rep., 3 Eq. 77; *Lowe's case*, Law Rep., 9 Eq. 589; *Allin's case*, Law Rep., 16 Eq. 449, 559; *Weston's case*, Law Rep., 5 Ch. App. 620; *Ex parte Elliott*, Law Rep., 2 Ch. Div. 104.

In a case where the directors had power to approve or reject the transfer of shares, one of the vice-chancellors, speaking of the right of a shareowner to dispose of his shares, said: "One of the incidents (of this class of property) is the right to transfer it—a right to make a present and complete transfer of it. It is the duty of the directors to receive and register the transfer or to furnish some (valid and sufficient) reason for refusing to transfer." *In re Stranton, etc., Co.*, Law Rep., 16 Eq. 559, per BACON, Vice-Chancellor.

Similar observations are made by the Supreme Court of the United States in the *Bank v. Lanier*, *supra*. Mr. Justice DAVIS then says: "The power to transfer their stock is one of the most valuable franchises conferred by Congress. \* \* It enhances the value of the stock. Although neither in form nor character negotiable paper, they (the share certificates) approximate to it as nearly as possible."

It would be a new, and I apprehend, a startling doctrine to proclaim that the holder of shares in a corporation, where the only provision on the subject of transfers was one requiring them to be made on its books, had no right to make a complete and effectual

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disposition of them without the consent of the directors or other shareholders. No such power over the right of transfer has been given in the National Banking Act. Such a power is so capable of abuse and so foreign to all received notions and the universal practice and mode of dealing in these stocks that it cannot in the absence of legislative expression, be held to exist.

For these reasons and upon these authorities the proposition must be considered as established that a shareowner in a National bank, while it is a going concern, has the absolute right in the absence of fraud to make a *bona fide* and actual sale and transfer of his shares at any time, to any person capable in law of purchasing and holding the same, and of assuming the transferor's liabilities in respect thereto, and that this right is not, in such cases, subject to the control of the directors or other stockholders.

Our second proposition is that Laffin did make a complete and effectual sale and transfer of his shares to James H. Britton individually, and that as to Laffin, it was not a sale and transfer of the stock to the bank. Laffin sold through the broker or agent, Keleher; and the latter dealt with Britton as an individual, without knowledge that Britton intended to turn over the shares to the bank, and he received in payment for the shares the personal check of Mr. Britton, and delivered to him at the same time the certificates of stock assigned, in blank, with powers of attorney in blank thereon indorsed, authorizing the transfer of the shares on the books of the bank.

As between Laffin and Britton, the transfer was complete by the sale, assignment, delivery and payment, without registration, and this whether it gave Britton before the registration, the legal title to the shares as against Laffin, or only a complete equitable title. *Union Bank v. Laird*, 2 Wheat. 390; *Webster v. Upton*, 1 Otto, 65, 71; *Black v. Zacharie*, 3 How. 483; *Bank v. Lanier*, 11 Wall. 369, 377; *Chouteau Spring Co. v. Harris*, 20 Mo. 382; *Moore v. Bank*, 52 id.; *N. Y., etc., R. R. Co. v. Schuyler*, 34 N. Y. 30; *McNeil v. Bank*, 46 id. 325; *Grymes v. Howe*, 49 id. 17; *Bank of Utica v. Smalley*, 2 Cowen, 778; *Bank of Commerce's Appeal*, 73 Penn. St. 59; *Ross v. S. W. R. R. Co.*, 53 Ga. 514; *Hoppin v. Buffum*, 9 R. I. 513; *Bank of America v. McNeil*, 10 Bush (Ky.), 54; *Davis v. Lee*, 26 Miss. 505; *German, etc., Ass. v. Sendsmeyer*, 50 Penn. St. 67; *Leavitt v. Fisher*, 4 Duer, 1.

That the transaction is complete as between seller and purchaser

of stock by the assignment and delivery of the certificate, with the power to transfer, and the receipt of payment is fully shown by these cases, and is also evident from the fact that thereupon each of them has the legal right to have a transfer of the shares made on the books of the bank. The seller of the shares, for his protection against creditors of the bank in case of insolvency, may transfer the same on the books to the vendee, the purchase being the authority to the seller to do this. *Webster v. Upton*, 1 Otto, 65.

And for like reason the seller of shares who has done all that is necessary to enable the purchaser to transfer the shares on the books may file a bill to compel the vendee to record the transfer. *Shaw v. Fisher*, 2 De Gex & S. 11; *Cheale v. Kenward*, 3 De Gex & J. 27; *Wynne v. Price*, 3 De Gex & S. 310; *Webster v. Upton*, 1 Otto, 65, 71.

So, also, the vendee of the shares, where the vendor has done all that is necessary to enable the transfer to be registered, may for his own protection compel the bank to register the transfer, or hold it liable in damages for a wrongful refusal. *Bank v. Lanier*, 11 Wall. 369; *Hill v. Pine River Bank*, 45 N. H. 300; *Bank of Utica v. Smalley*, 2 Cowen, 770; *Commercial Bank v. Kortright*, 22 Wend. 348.

The delivery of the share certificates and blank transfers will entitle the *bona fide* vendee to have the transfer registered. "Whoever in good faith buys the stock, and produces to the corporation the certificates regularly assigned, with power to transfer, is entitled to have the stock transferred (per DAVIS, J., *Bank v. Lanier*, 11 Wall. 369), unless there exists some valid and legal reason in favor of the bank for refusing to register the transfer as in the case of the *Union Bank v. Laird*, 2 Wheat. 390. In that case the charter gave the bank a lien for the shareholders' debt to it, and provided that "stock shall be transferable only on the books of the bank." Under these circumstances, the bank was held to have a lien on the shares to secure the shareowner's indebtedness to it, which was superior to the right of the unregistered transferee of the stock. *Black v. Zacharie*, 3 How. 483.

If the foregoing propositions are sound, Britton against Laffin had the right immediately on delivery and payment to register the transfer of the shares, and had the power to fill up the blank transfers, and have the transfer registered. *Re Tahiti Cotton Co.*, Law Rep., 17 Eq. 273; *German Union Ass. v. Sendmeyer*, 50 Penn. St.



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67; *Leavitt v. Fisher*, 4 Duer, 1; *Commercial Bank v. Kortright*, 22 Wend. 348. Nothing more was required to be done by Laffin or needed to enable Britton to make his title complete. And Laffin could have compelled Britton to register the transfer. If Laffin had proceeded against Britton he could have forced him to have accepted a transfer of the stock in his own name or in the name of some person capable of taking and holding the same. *Maxted v. Paine*, Law Rep., 6 Exch. 132. It would have been no answer to Laffin for Britton to have said: "I bought this stock, not for myself, but for the bank." Laffin could have rejoined, "You purported to act for yourself. I suppose you were so acting, and you had no authority, and could have had none, to act for the bank."

It is held in England under the Companies Acts that the transferor of shares is liable to be treated as a stockholder, until he transfers to one who is in law capable of holding, and liable in respect of the shares, and whose purchase is registered, unless, perhaps, where the neglect to register is entirely the fault of the corporation or its officers. *Fyfe's case*, Law Rep., 4 Ch. App. 768; *Lowe's case*, Law Rep., 9 Eq. 589; *Shropshire, etc., Railway and Canal Co. v. The Queen*, Law Rep., 7 House of Lords Cases, 496, 513; *McEuen v. West London Wharves, etc., Co.*, Law Rep., 6 Ch. App. 655; *Weston's Case*, Law Rep., 5 Ch. App. 614, 620; *Gooch's case*, Law Rep., 8 Ch. App. 266; *Gilbert's case*, Law Rep., 5 Ch. App. 559; *Master's case*, Law Rep., 7 Ch. App. 292; *Nickalls v. Merry*, Law Rep., 7 House of Lords Cases, 530; *Symon's case*, Law Rep., 5 Ch. App. 298; *Heritage's case*, Law Rep., 9 Eq. 5.

Assuming without deciding, that this principle applies in all its force under the National Banking Act, if Laffin had sold to an infant, his liability would remain, notwithstanding the transfer was registered.

*Nickalls v. Merry*, Law Rep., 7 House of Lords Cases, 530; *Symon's case*, Law Rep., 5 Ch. App. 298. If he had sold to the bank, he would remain *prima facie* if not actually liable, if the bank should so elect. And if the seller of shares remains liable under the National Banking Act until there is a registered valid transfer—that is, until some person succeeds to the stock who is capable of holding it and liable in respect to it—this principle will not make Laffin liable under the facts of the present case. Here the transfer was registered, but Britton, instead of registering it in his

own name, as it was his duty toward Laffin to do, registered it in his name as "trustee," without Laffin's knowledge. But the act (Rev. Stats., § 5152) authorizes the holding of stock by a trustee. If Laffin, in order to relieve himself of liability, is bound to see the transfer of the stock registered, the registry actually made would not charge him with constructive notice that the bank was in reality the *cestui que* trust.

Britton is responsible personally, inasmuch as he had no authority to act for the bank, and as there is no *cestui que* trust who is liable. He is liable for the unauthorized investment and use of the trust moneys of the bank, and can be compelled to refund it. *Great Eastern R'y Co. v. Turner*, Law Rep., 8 Ch. App. 149. If it becomes necessary to assess the stockholders he will be estopped to say that he is not individually responsible, since he was not acting by authority of any *cestui que* trust capable of taking and holding the shares. If the sale of this stock has been registered to Britton individually, it is clear that Laffin would not have been liable to the bank or its creditors; and as the matter now stands, the bank and its creditors have every right and remedy against Britton, which they would have had if the shares had been transferred to him individually, instead of to him as "trustee."

Our third proposition is, that Laffin is not liable, because the money received for the stock was unlawfully taken by Britton from the bank. The reason for this conclusion is that Laffin parted with value — with his shares, with his power of control over them and the right to sell them to others, and had no notice at, or prior to the consummation of the transaction that Britton was acting *ultra vires* and intended to misappropriate the funds of the bank. If he had dealt directly with the bank, or if he or his agents had known what took place inside the counter before the transaction with Britton had been completed, he would have been liable.

It is urged by the receiver's counsel that Laffin had constructive notice. Mr. Shields, in his argument, bases Laffin's liability on the proposition that, being a shareholder in the bank, he is charged with constructive notice of the condition of the bank, and of what was done by the president in violation of law and of his official duty in respect of these shares. I admit that if in a transaction directly with the bank, he had received moneys to which he was not entitled, he could be made to pay back the same irrespective

of the question of knowledge on his part. *Curran v. Arkansas*, 15 How. 304; *Railroad Co. v. Howard*, 7 Wall. 392.

But it is to be remembered in this case that Laffin is sought to be made liable in respect of the sale and transfer of his shares, which sale and transfer he had the perfect right to make, if he acted *bona fide*; and he has the same right to sell his shares to another shareholder, that he would have to sell them to a person not a shareholder.

Even directors have the right to make a *bona fide* sale of their shares and thus get rid of liability, if they pursue the articles or charter, and take no advantage of their position and commit no fraud. *Gilbert's case*, Law Rep., 5 Ch. App. 559; *Ex parte Little-dale*, Law Rep., 9 Ch. App. 257.

And shareholders in the exercise of their right to transfer shares are not bound, it seems, to take notice of irregularities on the part of the directors in respect to the transfer of shares. *Bargate v. Shortridge*, 5 House of Lords Cases, 297, 323; *Taylor v. Hughes*, 2 Jones and Lat. 24; *Ex parte Bagge v. Northern Coal Co.*, 13 Beav. 162.

Nor are directors, much less shareholders, in the transfer of their stock bound, it seems, to take notice of the books of account of the company. *Cartmell's case*, Law Rep., 9 Ch. App. 691; *Hill v. Manchester, etc., Co.*, 2 Nev. and M. 573; 5 Barn. and Adol. 874; *Haynes v. Brown*, 36 N. H. 568.

We are of opinion, therefore, that the sale and transfer of the stock as between Laffin and Britton was complete as soon as the stock was delivered and assigned, with the power to transfer, and payment received; and that what Britton, without Laffin's knowledge, afterward did, although on the same day, in transferring the shares to himself as trustee for the bank, and in reimbursing himself out of the funds of the bank, could not retroact upon Laffin, whose status had already been fixed, and whose rights had already been acquired. *Bank of America v. McNeill*, 10 Bush (Ky.), 54, 58.

Mr. Henderson's argument for the receiver went mainly upon the ground that Laffin was chargeable through Mr. Girault, with constructive notice of Britton's wrongful acts in the purchase of these shares and in the use of the bank's money to reimburse himself therefor.

This argument rests upon these propositions: First, that the sale was not complete until the transfer was registered; that in making the transfer, Girault, although acting under Britton's

directions, was solely Laffin's agent (by virtue of his inserting his name in the blank power of attorney), and that inasmuch as Girault knew of Britton's acts in directing the transfer for the benefit of the bank, and in paying himself for the purchase-money out of the general means of the bank, the law imputes this knowledge to Mr. Laffin. The first branch of this proposition is inconsistent with the one which we have above attempted to maintain, viz.: That the transaction between Laffin and Britton was complete without registration of the transfer, and that it is equally complete as to the bank, unless the bank had some valid reason for refusing to register the transfer, Britton had the right to register the purchase in his own name. He was in good credit with the bank and in the community. He was not then known to be insolvent. Indeed, it is not shown by the proofs that he is now insolvent. Laffin could have compelled him to register the transfer in his own name. In the eye of the law the transfer to Britton, as "trustee," is a transfer to Britton individually — for as above shown, Britton could not set up his *ultra vires* acts to defeat his personal responsibility. *Ashhurst v. Mason*, Law Rep., 20 Eq. 225; *Ex parte Littledale*, Law Rep., 9 Ch. App. 257. If Laffin had a completed right immediately on receiving payment for the shares to have Britton register the transfer of the shares; and if immediately on such payment, Britton had the right to register the transfer to himself, and if the bank could not have resisted Laffin's application to compel a registration of the transfer to Britton, it is obvious that notice subsequently received by Laffin personally, or through an agent, would be immaterial.

If this view is sound, it is unnecessary to decide the further question whether Girault, in consequence of his relations to Britton and the fact that he acted as his servant and implicitly obeyed his directions, is to be regarded, in making the formal act of transfer on the books, as the agent of Laffin, in such sense that knowledge required by him from Britton is to be imputed to Laffin. It deserves consideration whether under the circumstances Girault was Laffin's agent so as constructively to affect Laffin with notice of what was being done, not in the necessary or lawful execution of his authority, but in violation of that authority, and in hostility to his rights as well as those of the bank. These are the positions taken by Mr. Slayback in Mr. Laffin's behalf, and they certainly have great force. For in this view, if the name of some one

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outside of the bank, having no knowledge of what was going on inside the bank, had been filled in by Britton as the attorney to make the transfer, or if Britton had it filled in his own name, Laffin would not be liable. It is certainly extremely narrow ground to make Laffin's liability depend upon the accident whose name shall be used to make this formal transfer, and upon what knowledge of the interior workings of the bank such person may happen to possess, especially in view of the custom to transfer stock in blank through many hands before any registry is made.

It was strongly urged at the bar by Mr. Henderson for the receiver, that the foregoing views of the right of the shareholder to transfer his shares will have the effect to permit transfer to persons not able to respond to the double liability imposed on shareholders, and thus work an injury to the solvent shareholders and to creditors. But we must hold to the absolute right of the shareholder, to transfer his stock in good faith, or the alternative that the directors may have the right to refuse their assent to such transfer, thus putting a shareholder in their power. Not a syllable can be found in the Banking Act giving the directors such a power; while on the other hand the right to transfer shares is expressly recognized. If it is desirable for the security of the shareholders or creditors that the existing members should, through the directors, have a veto on the right of a shareholder to transfer his shares, such a power must be plainly conferred. It has not been given and cannot, therefore, be held to exist.

It is proper to remark in order to preclude erroneous inferences from the views here maintained, that it is probable that the unrestricted right to transfer has reference to transfers in solvent and going concerns, and are not intended to enable shareholders to escape from liability where the association has committed an act of insolvency or has ceased to be a going concern. *Allen's case*, Law Rep., 16 Eq. 449, per Lord Chancellor SELBOURNE; *Chappell's case*, Law Rep., 6 Ch. App. 902. While we maintain the right of a shareholder to dispose of his shares absolutely, by an out and out sale and registered transfer, and thus escape liability, provided the sale is made *bona fide*, and the purchaser is in law capable of assuming the liabilities of the transferor, yet this does not involve the right to transfer shares for a fraudulent purpose, or under circumstances which the transferor knows will make the transfer, if it is

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sustained, work a fraud on the other shareholders or on the creditors of the bank.

The result is that there must be a decree dismissing the bill as to Laffin, and as the bill is not framed for separate relief against Britton, dismissing the same as to him also, but without prejudice.

*Bill dismissed.*

## NATIONAL BANK OF MADISON v. DAVIS.

(6 Cent. Law Jour. 106.)

*Usury — Recovery or recoupment of excessive interest.*

If a National bank discount a note at a usurious rate of interest, paying the borrower the proceeds less the interest, it can recover only the face of the note less the entire interest received. But if such note be renewed, the borrower paying the usurious interest out of his pocket, in advance, the defendant may recoup, or recover in an independent action, double the amount of the entire interest paid at the renewal. If, instead of paying the usurious interest at each renewal, it be added to the principal and included in the renewal notes, the bank can only recover the amount originally paid to the borrower, *i. e.*, the amount of the last of the renewal notes less all interest included in it.\*

(Seventh Circuit; before DRUMMOND, Circuit Judge, and GRESHAM, District Judge.)

**A**CTION on a promissory note. The opinion states the case.

*C. E. Walker and C. L. Holstein*, for plaintiff.

*Herod & Winter*, for defendant.

GRESHAM, J. The plaintiff, on the 19th of May, 1869, for the defendant, Jacob Davis, discounted his note for \$3,000 at four months, with two indorsers, at the rate of twelve per cent per annum, paying Davis the proceeds less \$128.50, the interest reserved. There were divers renewals of this note, each renewal being for the full amount of the principal, Davis actually paying the interest in

\*See as to amount of interest which may be recovered or recouped, *Crocker v. First Nat. Bank*, ante, p. 317, and note. See as to recoupment, *Wiley v. Starbuck*.

## National Bank of Madison v. Davis.

advance, the bank reserving nothing out of the proceeds of the discount. The indorsers were accommodation indorsers, and there were different indorsers upon different renewals.

In 1873 Davis paid \$700 on the principal, thus reducing his loan to \$2,300, for which sum four different renewal notes were given. On December 9, 1873, Davis paid on one of these renewal notes twelve per cent interest in advance. This was the last usurious interest paid. From that date the plaintiff received only legal interest at the rate of ten per cent per annum. On April 1st, 1875, Davis renewed his loan by giving his two notes for like amounts, maturing at different dates, and the note sued on was given in renewal of one of these notes.

Section 30 of the National Bank Act, approved June 30, 1864, reads as follows :

"SEC. 30. And be it further enacted, that every association may take, receive reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State or Territory where the bank is located, and no more ; except that where, by the laws of any State, a different rate is limited for banks of issue, organized under State laws, the rate so limited shall be allowed for associations organized in any such State under this act. And when no rate is fixed by the laws of the State or Territory, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill or other evidence of debt has to run.

"And the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid, shall be held and adjudged a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back in any action of debt twice the amount of the interest thus paid from the association taking or receiving the same; provided, that such action is commenced within two years from the time the usurious transaction occurred. But the purchase, discount, or sale of a *bona fide* bill of exchange, payable at any other place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest."

If a National bank discount a note at a usurious rate of interest, paying the borrower the proceeds, less the interest, and suit be brought to recover the loan, and the borrower plead the usury, the bank will recover the face of the note less the entire interest taken out, received or reserved, and no more. It will thus collect

the sum of money it actually paid out, being punished for receiving interest in excess of the legal rate by forfeiting all interest. But if the note thus discounted be renewed for the same amount, the borrower paying usurious interest out of his pocket in advance, and suit be brought on the renewed note, the defendant may recoup double the amount of the entire interest actually paid on renewal, or in an independent action<sup>\*</sup> of debt, he may recover from the bank double the amount of the entire interest thus paid.

In either case the punishment of the bank is the same. In the latter case the bank forfeits double the amount of the interest paid, and yet recovers the amount it actually paid out, for it will be remembered the note sued on includes the amount of interest originally reserved. True, if the note be renewed in the same manner more than once, and the borrower be allowed to recoup, or in an independent action recover double the amount of usurious interest paid, the bank will lose part of the principal as well as all of the interest. But forfeiture of double the entire interest paid is barred after the lapse of two years.

If, instead of paying the usurious interest at each renewal of the loan, the same be added to the principal and included in the renewal notes, the bank, if the usury be pleaded, will recover the amount it originally paid to the borrower; that is to say, it will recover the amount of the last of the renewal series sued on, less all the interest included in it.

Usury forfeited the entire loan or debt under the Banking Act of February 25, 1863. This, Congress thought, was too severe, and the act of 1864, with the exception already noticed, limits the forfeiture to the interest only.

In the case of *Farmers', etc., National Bank v. Dearing*, 1 Otto, 29,\* the court say: "In the act of 1864 the forfeiture of the debt is omitted, and there is substituted for it the forfeiture of the interest stipulated for, if it had only been reserved, and the recovery of twice the amount when the interest had been actually paid."

The only forfeitures visited upon National banks, when they stipulate for or receive illegal interest, are those found in the Banking Act. They are not subject to any penalties or forfeitures contained in State statutes. 1 Otto, 2.

It is a familiar principle that forfeitures are never favored.

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Merchants' National Bank v. Mears.

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All actual payments in excess of the legal rate were made more than two years before the defendant's plea of usury was filed, and, in fact, more than two years before this suit was brought. The plaintiff is entitled to recover the amount of the note in suit with interest, less \$128.50, the interest reserved on the original discount, which is to be credited as of the date of the reservation, all other interest having been actually paid.

My brother DRUMMOND concurs in this opinion.

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## MERCHANTS' NATIONAL BANK V. MEARS.

(10 Chicago Leg. News, 180.)

*When National banks can take real security.*

A National bank cannot loan money on real estate security ; but after a creditor has made default, or after a loan has been actually made, the bank may take real estate security therefor unless the transaction be colorable for the purpose of evading the statute.\*

(Circuit Court, Seventh Circuit, Northern District of Illinois.)

**B**ILL in equity to foreclose a mortgage. Simeon Mears was a regular customer of the bank, and borrowed as much as \$13,000 at once. Some time prior to 1875, he borrowed \$5,000 on short time paper, and deposited as security, note of J. E. Warren for \$4,740, secured by mortgage to E. Ashley Mears, the note being payable to E. Ashley Mears, and indorsed over by him to Simeon Mears. When the latter's note matured he could not pay it, and the bank took Warren's note. When that matured Warren was insolvent, and Simeon Mears, who had indorsed it, was called upon to pay. The bank all the while held other securities, and by selling these, Mears' debt was reduced to \$2,887, September 3, 1875, when he gave a new note for this sum, and the Warren note was treated as collateral for this.

BLODGETT, J. This case was submitted to the court on final hearing upon the briefs of counsel and upon the proof taken before the master. It is a bill filed to foreclose a mortgage given by J. Esias Warren and wife to E. Ashley Mears, by E. Ashley

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\*See *Kansas Valley National Bank v. Rowell*, ante, p. 264 and note.

Mears assigned to Simeon Mears, and by Simeon Mears assigned to the complainant. The defendants to the bill are Simeon Mears and the mortgagor, and George B. Warren, who claims, as a grantee of the mortgagor, by a quit-claim deed made some month or so after the mortgage was made, but recorded prior to the mortgage. The quit-claim from Esias Warren, the mortgagor, to George B. Warren, was put on record something like a month prior to the recording of the mortgage, although the mortgage was made prior to the quit-claim deed, but the testimony of George B. Warren shows very clearly that he took title from J. Esias Warren, mortgagor, subject to all liens then existing against the property, but took it merely as security, and with the understanding that he took it subject to any liens which had been created upon the property.

There are two objections by these defendants to the foreclosure, first on behalf of George B. Warren, that he is an innocent purchaser without notice, which I have said is sufficiently disposed of by his own testimony. The second is, that this bank — the complainant in this case, being a National bank, acting under the National Banking Law, cannot make loans upon this class of security. The facts about which there is to be no dispute are, that Warren made his note, secured by a mortgage, to E. Ashley Mears; E. Ashley Mears assigned to his father, Simeon Mears, and Simeon Mears took it to the complainants in this case, the Merchants' National Bank of this city, and effected a loan, giving the note as collateral security for the loan. This was some time shortly after the note was made — within a few months. It was carried along until sometime in the year 1875, when Mr. Mears paid up part of the loan, and the bank further reimbursed itself for the full loan, by the sale of other collaterals, and became the owner by sale, and an agreement between themselves and Mears, of the Warren note and mortgage as final security for the payment of the balance of twenty-seven or twenty-eight hundred dollars. It is objected, as I said before, that this transaction is *ultra vires*, that it is beyond the power of a National bank to make a loan upon real estate security, and a large array of authorities is cited in support of this proposition, and it is a proposition in regard to which I have no doubt, where it is invoked in a proper case; but here, I do not think the loan can be said to have been made upon real estate security.

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Merchants' National Bank v. Mears.

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It was made upon a note to Mears, secured by collateral. The collateral was the Warren note — with such incidental security as the Warren note had.

I had occasion, about a year ago now, to go quite carefully into this question in a suit brought by the Northwestern National Bank against Loewenthal, where precisely this same question was raised and contested very vigorously. All the authorities were there considered that entered into this brief; and I held then, and on re-examination of my position at that time, I am contented with the view I then took of the case — that the transaction cannot be held to be within the limitations, either expressed or implied, of the National Banking Law. The seventh clause of section 5136 reads as follows: "To exercise by its board of directors or duly authorized officers or agents, subject to law, and all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt, by receiving deposits, by levying and selling exchange coin and bullion, by loaning on personal security, and by obtaining, issuing and circulating notes, according to the provisions of this title."

It is claimed, and I think it has been amply held by various State courts, and indirectly by the United States court, that National banks can only loan money on personal security directly. Section 5137, second clause, provides: "A National banking association may purchase, hold and convey real estate for the following purposes, and no others: Such as shall be mortgaged to it in good faith by way of security for debts previously contracted."

Here is the express power to take a mortgage on real estate for debts which have been previously contracted. You may not loan money on real estate security; but after the creditor has made default, or after the loan has been actually made, the bank may take real estate security, unless the transaction should be colorable for the purpose of evading the statute — making the loan first, and taking security so soon afterward as to show it was part of the original understanding; but in a case such as is provided here, there is no doubt but what the bank, after having made a loan, if it becomes doubtful of the borrower's solvency or ability to give satisfactory security, may then take a mortgage on real estate, so that this case now before me is not affected by the clause which I have just read. It simply authorizes them to take security on real estate under certain circumstances.

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Bailey v. Sawyer.

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The former objection which I read in the preceding clause undoubtedly contemplates that the National banking business — that its loans and transactions shall be made upon personal security. But was this any thing but personal security? The bank had the note of Simeon Mears with a large amount of other collaterals, the whole transaction, in its inception, amounting to thirteen thousand dollars, and from time to time, Mr. Mears made payments, and other securities were applied which were held by the bank, until the indebtedness from thirteen thousand dollars was reduced to twenty-seven hundred dollars, and then, by an arrangement between the parties, this was taken as final satisfaction or security for the twenty-seven hundred dollars balance.

I think that this cannot be held within the inhibiting clause, and I am most clear that the defense set up cannot avail.

There will be a decree for the complainant for the amount found due, and it will be determined, of course, after the sale of the estate, whether there is any residue to go to the other parties in interest, after satisfying the lien of the bank.

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BAILEY V. SAWYER.

*Winding up National bank — Individual liability of stockholders, how enforced.*

In winding up an insolvent National bank, the Comptroller of the Currency is vested with authority to determine when a deficiency of assets exists, so that the individual liability of the stockholders may be enforced, and no appeal lies from his decision.

The liability of a stockholder of a National bank is several, and is fixed by his taking stock in the corporation.

When an assessment upon the stockholders is ordered by the Comptroller, a suit at law is the proper remedy to enforce it.\*

(District Court, District of Minnesota.)

THIS is a common law action brought by the receiver of the First National Bank of Duluth to enforce the individual liability of a stockholder in the First National Bank of Duluth, and to cover the amount of an assessment ordered by the Comptroller

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\*See *Casey v. Galli*, ante, p. 142.

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Bailey v. Sawyer.

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of the Currency to the extent of seventy-five per centum of the par value of the shares of the capital stock of the bank, under and by virtue of the act of Congress in relation to National banks.

A demurrer is interposed to the complaint. Upon the argument it is urged :

(1) That the complaint should set forth the facts and *data* upon which the Comptroller determined that a necessity existed which authorized proceedings to enforce the individual liability of stockholders.

(2) That the suit should have been in equity, and not in law.

*W. W. Billson*, for demurrer.

*Ensign & Cash*, *contra*.

NELSON, J. The Comptroller of the Currency, by virtue of the National Banking Law in winding up an insolvent bank, is vested with authority to determine when a deficiency of assets exists, so that the individual liability of the stockholders may be enforced. This liability is conditional and was so held in *Bank v. Kennedy*, 17 Wall. 22, but the Comptroller, in the exercise of a judicial discretion, decides upon the *data* before him when "it is necessary," to compel contribution from stockholders to pay the debts of the bank. The law clothes him with this authority, and no appeal lies from his decision by a stockholder. He appoints a receiver and resorts to the ultimate remedy whenever in his judgment the condition of the bank requires its enforcement. And as stated in *Kennedy v. Gibson et al.*, 8 Wall. 505, a more speedy settlement of the affairs of an insolvent bank is thus obtained. Again, this obligation of the stockholder is fixed when he becomes a member of the corporation by taking stock therein, and is several, not joint. There is no necessity for invoking the aid of a court of chancery to determine the sum each stockholder must pay, for that is regulated by the number of shares of stock owned. When the Comptroller declares and orders an assessment, the precise amount each stockholder must contribute is a certain exact sum. A suit at law would seem to be the suitable proceeding to collect the assessment.

*Demurrer overruled.*

## THE UNITED STATES V. RHAWN.

(33 Legal Intelligencer, 258.)

*Examination of National banks by revenue officers.*

The law under which National banks are incorporated does not exempt them from examination by the internal revenue officers, mentioned in section 3177 of the Revised Statutes.\*

A clerk of a supervisor of internal revenue is, however, not such an officer.

THIS case was tried at the November Sessions, 1875, of the United States District Court, for the Eastern District of Pennsylvania, before Judge CADWALADER, who charged the jury as follows :

CADWALADER, J. Section 3177 of the Revised Statutes of the United States enacts, that any collector, deputy-collector, or inspector may enter, in the day time, any building or place where any articles or objects subject to tax are \* \* \* kept, within his district, so far as it may be necessary for the purpose of examining said article or articles, and that any owner or person having the agency or superintendence of such building or place, who refuses to suffer such officer to examine such article or articles, shall, for every such refusal, forfeit five hundred dollars. Section 3163 enacts, that every supervisor, under the direction of the commissioner, shall see that all laws and regulations relating to the collection of internal revenue taxes are faithfully executed and complied with, etc.

The present suit is to recover \$500, a penalty alleged to have been incurred by the defendant, who is president of a National bank, by refusing to suffer a person who was acting under the direction of Mr. Tutton, the supervisor of internal revenue, to examine such checks of customers of the bank as were kept in it, in order to discover whether any and which of them were unstamped, contrary to the provisions of the Internal Revenue Law upon the subject.

It is alleged that there was an application to the defendant to suffer such an examination to be made, and that the defendant refused to suffer this to be done.

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\* See *United States v. Mann*, ante, p. 154.

The defendant contends that the revenue officer had no right to make the examination requested. The ground of this contention is, that the law under which the National banks are incorporated provides for the occasional examination of their affairs, and for reports of their condition to the Comptroller of the Currency, and enacts that they shall not be subject to any visitorial powers other than are authorized by the act, or are vested in the courts of justice.

These banks are fiscal agents of the government of the United States, and it would be most extraordinary that Congress should have exempted their customers from a necessary and proper scrutiny under the revenue laws in a matter which has no legitimate connection whatever with the affairs of the banks. As to the position thus taken by the defense, I am of the opinion that it is wholly unreasonable and unfounded in law. If you believe the testimony of Mr. Tutton, he told the defendant that there was no desire or intention to examine into the affairs of the bank, or the accounts of its customers, and stated that the sole purpose was to ascertain whether checks in its keeping were unstamped. If unstamped, they were subject to tax under the revenue law.

The visitorial powers over a corporation are the subject of a distinct head under the law of corporations. The examination of such checks under the revenue law is not the exercise of a visitorial power under the act of Congress relative to the banks. This part of the defense, therefore, fails in law.

It appears, however, that the person who asked to make the examination in this case was a clerk to the supervisor. Such a person is not an officer within the meaning of the law. The words of section 3177 are, "any collector, deputy-collector or inspector;" and a clerk to the supervisor is not included in this description.

If the supervisor was himself authorized to make such an examination, he could not delegate this power to his clerk. Your verdict should, therefore, for this reason, be for the defendant.

*John K. Valentine, Esq.*, U. S. Attorney, for plaintiff.

*Charles S. Pancoast, Esq.*, for defendant.

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Duncan v. First National Bank of Mt. Pleasant.

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## DUNCAN V. FIRST NATIONAL BANK OF MT. PLEASANT.

(11 Bank. Mag. 787.)

*Usury by National banks — Rate of interest — Limitation of actions to recover twice amount of interest paid.*

National banks are not authorized to take the rate of interest allowed by special statutes of a State to a few banks of issue where such rate is higher than that allowed to banks of issue generally.

Where a National bank has taken usurious interest on a loan or discount, it may elect to apply the excess of interest on the principal at any time before the loan is paid in full, or before judgment is entered for the full amount. Therefore, the two years within which an action may be brought to recover twice the amount of interest paid do not begin to run until the principal has been paid or a judgment entered for the full amount thereof.

THESE cases, for the recovery of penalties for exacting usurious interest, were decided in the United States District Court at Pittsburgh, on March 14th, 1878, the jury rendering a verdict for the plaintiffs in double the amount of interest charged. The verdict for Millinger was \$76.04, and for William Duncan & Brother, \$1,259.92. The charge of the court, delivered by Judge KETCHAM, is as follows:

KETCHAM, J. These are cases brought by the plaintiffs to recover from the defendant the penalty for taking usurious interest under the thirtieth (30th) section of the National Bank Law of June 3, 1864. By agreement of counsel, both these cases, William Duncan & Brother and Benjamin Millinger, are tried by you together. The plaintiffs, as you have seen in the course of the testimony at different times, loaned money of the defendants, Duncan & Brother, at three different times; \$500 on January 30, 1873, \$4,000 on July 9, 1873, and \$500 July 18, 1873. Benjamin Millinger loaned \$250 January 27, 1873, and \$274.35 January 15, 1875. At the time of the loan in each case the bank retained nine per cent as discount and credited the plaintiff with the balance, taking their notes respectively for the full amount of proceeds and discount. The notes of Duncan & Brother were not paid at maturity, but were renewed from time to time. The first note of \$500, of January 30, 1873, was renewed till the fall of 1874. It had been reduced by payments to the sum of \$150. The note of July 9,



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1873, for \$400, was renewed till October, 1874. The note of July, 1873, for \$500, was renewed till November, 1874. At each renewal nine per cent interest was charged, and was paid by the plaintiffs. These notes were all sued and judgment obtained upon them for the face of the notes or principal, before the bringing of this suit. The Millinger notes were renewed; the note of January 27, 1873, for \$250, from time to time till March, 1874, when it was paid in full; the note of January 15, 1875, for \$274.35, was renewed at the end of three months, for two months, and then for one month, and remained unpaid until suit was brought upon it. Judgment was obtained upon it for the full amount and interest from maturity to judgment. Interest was charged at each renewal at nine per cent. No credit was given on the principal of any payment of interest by way of reducing the principal of either of the notes of Millinger or Duncan & Brother. Judgment was entered for the notes in full, independent of interest. And the note that Millinger paid he paid in full without reduction of any payment made of interest. The nine per cent that had been paid and retained was left entirely out of the computation.

The act of Congress permits the National banks to charge the rate of interest fixed by law in the State where they are located, and no more except when by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized or existing in any such State under this title. The legal rate of interest in Pennsylvania is six per cent. The rate of discount allowed to banks of issue is also six per cent and no more. It is true there are some banks, that, by special acts of Assembly, are allowed to charge more, but these are exceptions to the general law of the State. Congress deals with general rules, and when it excepts banks of issue under the State laws, it means the general law, applicable to the whole State, and relating to banks of issue all over the State. The special acts authorizing banks of issue, if there are any, apply only to the particular bank created by them, or permitted by them, to take more than six per cent discount. The National Banking Law prohibits a National bank in Pennsylvania from taking more. In case a greater rate of interest has been paid, the person by whom it has been paid, or his legal representative, may recover back, in an action in the nature of an action of debt, twice the amount of the interest thus paid from the association taking or receiving the

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same, provided such action is commenced within two years from the time the usurious transactions occurred.

From the origin of the loan, from the retaining of the first discount through all the renewals up to the time of final payment of the principal, or up to the time of entering judgments, there is a *locus penitentiae* for the party taking the excessive interest. Any time till then he may consider the excessive interest paid on account of the loan, and so apply it, and lessen the principal. Up to that time he may make this election. When payment is actually made or judgment is entered, the election is made, and if, as in these cases, judgment is entered for the face amount of the notes or full amount of the loan, or payment is taken in full without any reduction by taking out the excessive interest, the cause of action is complete. The original loans in these cases were more than two years before these actions were brought, but the payment of one of the Millinger notes was made, and the judgment on the other Millinger note and the judgments on all the Duncan & Brother notes were entered, near the time of bringing these suits, less than two years before. The payment and the judgment concluded the transaction, and determined their character to be usurious. Till that time it was undetermined and the statute did not begin to run. These actions were brought February 1, 1876. The Millinger note was paid in March, 1874. The judgment against Millinger and those against Duncan & Brother were obtained before February 1, 1876. So that they are within the statute. The Millinger note was not paid in money direct, but by the proceeds of another note, made by another person, and indorsed by Millinger. This was not a renewal, but payment. It closed out the old note and commenced another transaction on a different piece of paper, with different parties under different liabilities. The defendants treated it as payment, and made the entries in their books accordingly. The amount of interest charged in these cases is computed, and is agreed upon by the counsel of both parties as correctly computed. It amounts in the case of Benjamin Millinger to \$38.02. In the case of William Duncan & Brother to the sum of \$629.91. It is the amount of interest retained and paid upon each of the notes sued by defendants up to the entry of judgment, and upon the note paid by Millinger to the time of the payment. You will find double the amount in each case for the plaintiffs respectively.

## BRANCH V. THE UNITED STATES.

(12 Bank. Mag. 61.)

*National banks as depositaries of public money.*

Designating a National bank as a depositary of public moneys does not constitute it an agent of the government, or render the government liable for moneys lost by a failure of such bank.

Such bank does not become a custodian of the public moneys deposited with it, but it becomes a debtor to the United States the same as it does to other depositors for individual deposits.

Certain moneys coming into the possession of the clerk of a Federal court pending a litigation, were by him deposited in a National bank which had been designated as a depositary of public moneys. The bank failed. *Held*, that the United States were not liable for the money so deposited.

RICHARDSON, J., delivered the opinion of the court. The facts in this case, concisely stated, are these: In the year 1865 the claimants were owners of fifty bales of cotton which were seized by the marshal of the middle district of Alabama, upon a warrant duly issued by the District Court, on an information filed therein by the district attorney and others, informers, for the seizure, confiscation, and condemnation thereof, under the act of August 6, 1861, chap. 50 (12 Stats. 319), because the same was used and employed by the owners, or with the consent of the owners, in aiding, abetting, and promoting insurrection or resistance to the laws and authority of the United States. While the suit upon the information was pending the cotton was sold by the marshal, by order of court, for the sum of \$4,050, and the net proceeds after deducting expenses were brought into court and paid over to the clerk, amounting to \$1,872.50. The clerk, having been notified by a circular from the Secretary of the Interior, that the First National Bank of Selma, Ala., had been designated by the Secretary of the Treasury, as a depositary of public money under the provisions of the act of June 3, 1864, ch. 106, § 45 (13 Stats. 113), deposited the money thus held by him in said bank to his own credit as clerk, pending proceedings in the suit for condemnation, and to await further orders of court. In 1867 the bank failed, went into involuntary liquidation, a receiver was appointed by the Comptroller of the Currency, and its affairs were

wound up, paying a dividend of thirty-five per cent to its creditors.

In January, 1871, the suit for condemnation was dismissed on motion of the district attorney, and judgment was entered for the defendants therein, for costs. In 1875, the dividend on the clerk's deposit in the bank, amounting to \$641.32, was brought into court by the receiver, paid over to the clerk, and subsequently allowed and paid to the present claimants by order of the court.

All that the claimants received of the money for which the cotton was sold was thirty-five per cent of the net proceeds deposited in the bank.

Upon this state of facts the claimants come into this court and seek to charge their loss upon the United States. Without setting forth in their petition the grounds on which it is claimed that the defendants are liable, they pray judgment for the whole amount for which their cotton was sold, less the dividend received by them, with interest thereon from the day of seizure, as though the United States were to be charged with damages for an illegal seizure. But in a supplementary brief, in manuscript, handed to the court since the argument by the claimants' attorney, they present their case as an action for money had and received, and rely entirely upon the position which they assume that the First National Bank of Selma, having been designated as a depository of public money by the Secretary of the Treasury, was part of the Treasury of the United States, and that the money deposited therein by the clerk of the court was for the time being "public money" in the Treasury of the defendants, which they were bound to keep safely and return to the claimants when their right thereto became established.

This view of the relation of the National banks, which are designated depositories of public money, to the United States government is, in our opinion, wholly untenable.

National banks are private corporations, organized under a general law of Congress, by individual stockholders, with their own capital, for private gain, and managed by officers, agents, and employees of their own selection. They constitute no part of any branch of the government of the United States, and whatever public benefit they contribute to the country in return for grants and privileges conferred upon them by statute is of a general nature, arising from their business relations to the people through individual citizens, and not as direct representatives of the State

as a body politic, in exercising its legal and constitutional functions.

The Comptroller of the Currency has certain supervisory powers and duties in relation to National banks, designed to keep the officers within the limits of the law, in conducting their legitimate business, and, as far as lies within the province of official supervision by the government, to protect the creditors and stockholders against fraud, negligence and mismanagement. But in all contracts the banks act for themselves alone, and have no authority to involve the government in liability, except the statute liability for the final redemption of their circulating notes. These notes, denominated "National currency," and forming to a large extent the circulating money of the country, are the notes of the banks and not of the United States, although in case of insolvency of the banks they are payable out of the Treasury, and are secured by bonds deposited with the Treasurer, and by a preference in the distribution of the assets of the banks. But the bonds so deposited are held as a special pledge for the redemption of the circulating notes, and can be held and used by the government for no other purpose, not even to secure other indebtedness or obligations to the United States. 12 Opins. Attys.-Gen. 549.

By the forty-fifth section of the General Banking Law (13 Stats. 113), it was provided :

"That all associations under this act, when designated for that purpose by the Secretary of the Treasury, shall be depositaries of public money, except receipts from customs, under such regulations as may be prescribed by the Secretary ; and they may also be employed as financial agents of the government ; and they shall perform all such reasonable duties as depositaries of public moneys and financial agents of the government as may be required of them. And the Secretary of the Treasury shall require of the association thus designated, satisfactory security, by the deposit of United States bonds and otherwise, for the safe-keeping and prompt payment of the public money deposited with them, and for the faithful performance of their duties as financial agents of the government." Rev. Stats., § 5153.

Designating a National bank as a depositary of public money under this provision does not change the character of its organization, or convert its managers into public officers, or give to the government any additional control over the institution, or render the United States liable for any of the acts, contracts, or obligations of the bank. Nor does it constitute the bank a general financial agent of the government, but when after such designa-

tion it is required by law or by direction of the Secretary of the Treasury to perform any financial duties for the United States, it then becomes a special agent for the particular purpose required, with no power to bind the government beyond the special authority conferred upon it. In short, constituting a National bank a depository of public money is an employment of the institution for business purposes, as it is employed by individual depositors, and not an assumption of its powers and liabilities by the National government, nor the making of it, as an institution, a part of the United States Treasury. Under the provision of the post-office laws, now no longer in force, allowing "all official communications addressed to either of the Executive Departments of the government, by an officer responsible to that department," to be sent free through the mail, it was early held by advice of the Attorney-General, that the officers of designated depositories, under the general banking law, were not officers responsible to the Treasury Department, but were officers of the banks, responsible only to the institutions themselves, and so their correspondence on official business with the Secretary of the Treasury could not be carried free by mail. 11 Opins. of Attys.-Gen. 23.

The United States Treasury proper, as constituted by what is commonly known as the "independent treasury" act, first passed July 4, 1840 (5 Stat. at Large, 385), repealed August 13, 1841, and again re-enacted with additional provisions August 6, 1846 (chap. 90, 9 Stat. at Large, 59), is a *depository* of public money, where the actual money of the government — gold, silver, bullion, notes and currency — is kept in kind, as received from the public revenues, or deposited there by express authority of law, and where it remains the specific property of the government, and cannot be intermingled with other funds, as the Treasurer is not authorized to permit other money to be deposited therein, except in special cases expressly provided for by statute. And the "Sub-Treasuries," commonly so called, under the charge of assistant treasurers, where the public money is received and kept under like regulations, as well as the mints and perhaps other like places of deposit, may, in a general sense, be considered as parts of the United States Treasury. Rev. Stats., §§ 3591, 3592, 3593, 3594, 3595, etc. It is made the duty of the Treasurer, all assistant treasurers, and those performing the duties of assistant treasurers, all collectors of customs, all surveyors of the customs acting as collectors, all receivers of

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public money of the several land-offices, all postmasters, and all public officers of whatever character, to keep safely any public money intrusted to them, without loaning, using, converting to their own use, depositing in banks, or exchanging the same for other funds than as specially allowed by law, and severe penalties are attached to any breach of such duty. Rev. Stats., §§ 3639, 5489, etc.

But when public money is deposited with a designated-depositary National bank, it is not there retained in kind as the special property of the United States, of which the bank is made the custodian, but it becomes at once the property of the bank ; is mingled with its other funds, is loaned or otherwise employed in the ordinary business of the corporation ; and the bank, instead of being a custodian of public money, becomes a debtor to the United States precisely as it does to other depositors on receipt of individual deposits. Such was the practical construction adopted immediately on the designation of National banks as depositaries of public money, after the passage of the National Banking Law, and ever since uniformly followed without question. The government has the same rights and remedies against the bank as other creditors have. If the bank fails, the United States resort to the collateral security, if any, given to secure the deposits of public money to the extent of the proceeds thereof, and if, after that is exhausted, a balance due for deposits remains unpaid, the government takes its dividend thereon, with other creditors, and is entitled to no priority or preference, if the construction given in opinions of the Attorneys-General who have advised the executive officers on that subject be correct, which has not been judicially determined. 12 Opins. of Attys.-Gen. 549 ; 13 id. 528.

By section 3640 of the Revised Statutes it is provided that " the Secretary of the Treasury may (except as to money belonging to the postal service) transfer the money in the hands of any depositary of public moneys, to the Treasury of the United States, to the credit of the Treasurer."

Thus it is manifest that designated-depositary banks are not made part of the Treasury of the United States proper, rendering the government liable for the safe-keeping or repayment of the money deposited therein, to the credit of the customers of those institutions. As to its own public money intrusted thereto, it relies upon the credit of the corporations, and the securities taken

as collateral, of which the one is subject to the vicissitudes of the institutions, and the other to the care and vigilance of the public officers. Such money, or the credits therefor, when under the control of the Treasurer of the United States, and subject to his draft, may, to that extent, and in some sense, be regarded as in the public Treasury, and other government money deposited there to the credit of other public officers charged with its receipt or expenditure, may be considered as public money, although not in the Treasury.

The term "public money," as used in the statutes of the United States, ordinarily means the money of the government, received from the public revenues or intrusted to its officers charged with the duty of receiving, keeping, or disbursing the same whatever it may be. Such money, when illegally obtained therefrom, may be followed by the government into the hands of the wrong-doer, and recovered as a debt due from him, with the preference over other creditors in the distribution of his assets in case of insolvency given to the United States by statute. *Bayne et al. v. The United States*, 94 U. S. Reports. It does not include the money of States, counties, cities and towns, although with reference to those governments and municipalities such funds in other connections would be deemed public money. Nor does it include money in the hands of the marshals, clerks, and other officers of courts, held by them under authority of law, to await the judgment of the court in relation to the ownership thereof. Such money constitutes trust funds held by individual litigants, and not for the public, as represented by the government—money which cannot be used by anybody until the rightful ownership is determined, and when deposited in any bank is at the risk of the true owner, or of the officer depositing it, according as the latter has or has not legal authority for substituting the credit of the bank for his own custody thereof. The term is thus used in the act originally establishing the Treasury Department, passed September 2, 1789, chap. 12, § 6 (1 Stat. at Large, 65), in the acts of July 4, 1840, chap. 41 (5 Stat. at Large, 385), and August 6, 1846, chap. 90 (9 Stat. at Large, 59), establishing the "independent treasury," in all of the numerous revenue and fiscal acts of Congress found in the Statutes at Large, as well as in the Revised Statutes, where it forms one of the principal divisions of the laws in that volume, as the fortieth title. Rev. Stats., §§ 3591, 3659.



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From the year 1814 to the present time, there have been special provisions of law for the deposit and safe-keeping of money paid into the District and Circuit Courts of the United States, different from those applicable to public money. By the act of April 18, 1814, chap. 62 (3 Stat. at Large, 127), money paid into said courts to abide the order of court, was required to be deposited in such incorporated bank as the court should designate, and there remain until it should be decided to whom it of right belonged. If there were no such bank in the district, the court might direct the money to be deposited according to its discretion. By the act of March 3, 1817, chap. 108 (3 Stat. at Large, 395), all money paid into said courts or received by the officers thereof, in cases pending therein, was required to be deposited in a branch of the United States Bank, if there were one in the district, to the credit of the court, and to be drawn only upon the order of the judge, and if there were no such branch bank in the district, then in some incorporated State bank, and if there were neither in the district, then it was to be deposited according to the discretion of the judge. These acts remain still in force, still requiring officers of courts to deposit in State banks their trust funds, long after it was made a penal offense for "all public officers of whatever character" to deposit in any bank the public money collected by them (act of 1846, chap. 90, § 6, 5 Stat. at Large, 60) and after the passage of the general banking law of June 3, 1864, by which National banks might be made depositaries of public money; and they were not repealed until the year 1871. Chap. 2, § 6, 17 Stat. at Large, 2.

Such was the statute law so far as applicable in 1866, when the money now in question was deposited in the First National Bank of Selma. There being no branch bank of the United States in existence, the clerk was bound by law to deposit the money in an incorporated State bank or otherwise, according to the discretion of the court. He had no right to deposit it anywhere to the credit of the United States Treasurer, nor in the public treasury to the credit of anybody. It was required to be deposited as a private credit within the exclusive control of the court. In selecting a National bank, the clerk was no doubt acting under the direction and according to the discretion of the court, as he was bound by law to act, influenced perhaps by the circular of the Secretary of the Interior, giving notice that the First National Bank of Selma had been designated as a depositary of public money. That circu-

lar, however, did not change the legal duties and obligations of the courts, or the officers thereof, or of the banks named therein, and it created no liabilities whatever on the part of the United States.

The clerk did not attempt to place the money in the United States Treasury. He intrusted the funds in his custody to the safe-keeping of the bank, and took the obligation of that corporation and not of the government. The bank became his debtor, and the United States were neither creditors of the bank nor debtors to the depositor on account thereof. The government not only did not receive the money, but could not have recovered it by action nor have obtained possession of it by any process.

It will be noticed that the facts proved do not show and the petition does not allege that the Secretary of the Treasury had taken any security from the bank for this deposit, or for the deposit of any public money therein, and that it does not appear that he was ever notified or ever knew of this deposit having been made by the clerk of the court.

Under all these circumstances, nothing can be more clear than that the defendants are not liable in an action for money had and received, or in any other form, for the safe-keeping and return of money not belonging to the United States, nor intrusted to any of their officers, but deposited by the clerk of the court in the First National Bank of Selma, in his own name and to his own credit.

Since the rights and liabilities of the parties in this case, arising from the transactions set forth in the findings, were fixed, Congress has made new and different provisions, by the act of March 24, 1871, in relation to moneys paid into the courts of the United States, expressly repealing the acts of 1814 and 1817, above referred to (Rev. Stats., §§ 798, 995, 996, 5504, 5505), but not repealing the provisions in relation to money in the hands of assignees in bankruptcy. Rev. Stats., § 5059; 14 Opins. of Attys-Gen. 362.

By the law now in force, all money paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated therein, must forthwith be deposited with the Treasurer, an assistant treasurer, or a designated depository of the United States, in the name and to the credit of the court, unless it is delivered upon security according to the agreement of parties, under the discretion of the court, as it may be by virtue of a proviso in the act of 1871, re-enacted in Revised Statutes, sec-

tion 995. When such money is deposited with the Treasurer, or an assistant treasurer, where it is mingled with the public money, it is undoubtedly intrusted to the custody of the government, but when deposited in a bank, though a designated depository, it would still seem to be the private deposit of trust funds for the security of which the credit of the bank, and not of the government, is taken.

Whether or not the proceeds of securities taken for the protection of public money simply can be applied to the repayment of deposits to the credit of the courts, either *pro rata* with the debts due to the government, or after the payment of such debts to the extent of any balance of the proceeds remaining, in case of the failure of a depository bank owing both classes of deposits, or whether the Secretary of the Treasury may now legally and properly require of designated depositories securities sufficient to protect court funds as well as public money, and so expressly pledged, or whether it is not rather within the power of the litigants interested and the discretion of the courts themselves, either to require security for such deposits, under the proviso above referred to, or to intrust them wholly to the credit of the corporations, are questions for consideration elsewhere, and not here, and we express no opinion thereon.

The judgment of the court is that the petition be dismissed.

# CASES DECIDED

## IN THE

### COURTS OF THE SEVERAL STATES.

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McIVER v. ROBINSON.

(53 Alabama, 456.)

*Taxation of National banks.*

A State statute provided that all property, real and personal, not otherwise specified therein, or exempt from taxation, should be "listed" for taxation. There was an exemption of "all shares of the capital stock of any company or corporation which is required to list its property for taxation." *Held*, that this exemption did not apply to National banks whose capital was invested in government bonds, and that the shares of such banks were property to be listed.

PETITION for a writ of *certiorari* to revise the action of Robinson, tax collector of Montgomery county, who had assessed taxes of plaintiff's shares in the First National Bank of Montgomery. The defendant demurred to the petition and the demurrer was sustained.

The petitioner appealed.

*Stone & Clopton and James W. Lapsley, for appellant.*

*Henry C. Semple and D. S. Troy, contra.*

BRICKELL, Circuit Judge. The case presents but two questions, which are, it seems to us, free from all difficulty, in view of the decisions of the Supreme Court of the United States, and of the

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Melver v. Robinson.

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appellate courts of the several States, in which they have been considered. The first of these is, the liability of shares in National banks to State taxation at the place where the bank is located, without regard to the residence of the shareholder; the second is, whether the revenue law of 1868 imposed a tax on such shares, and if imposed, is it at a greater rate than is imposed upon other moneyed capital in the hands of individual citizens of the State?

The acts of Congress under which National banks are organized expressly authorize State taxation of the shares in such banks, at the place where the bank is located, without regard to the domicile or residence of the respective shareholders. *Tappan v. Merchants' National Bank*, 19 Wall. 490.\* The restriction or limitation on the power of the States to impose such taxation, originally fixed, was, not only that it should not exceed the rate assessed on other moneyed capital, but that it should not exceed the rate imposed upon the shares in any of the banks organized under the authority of the State. State banks having been dissolved, or merged into National banks because of the tax imposed on them by Congress, to promote the policy of the National banking system, in 1868, the power of the State to tax was subjected to the sole limitation that it should not impose a greater rate of taxation than was imposed on other moneyed capital. 15 U. S. Stats. 34. Property, real or personal, is the legitimate subject of taxation, because of the protection afforded it by government. The law of the State in which the National bank may be located affords to it, and to its shareholder, the measure of protection extended to the citizen, and to his property. In the absence of positive congressional enactment, the contracts into which the bank may enter are construed and enforced according to the law of the State in which it is located. The courts of the State are open to it as freely as to the citizen. Whatever of profits the shareholder may derive are derived from business transacted in the State, and under its laws. The substantial reason for exempting them from State taxation, which might be urged, is, that they are instrumentalities or agencies of the Federal government, by which some of its most important operations are conducted. If subjected to State taxation, the power could be so exercised as to destroy them, or if not, to embarrass them, and to embarrass the Federal government. That reason was fully considered by the Congress, and against such perversion or

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\* See *ante*, p. 100.

abuse of the taxing power of the States, the banks and the government were guarded. Equality of, and not exemption from, taxation by the State was secured. *National Bank v. Commonwealth*, 9 Wall. 353 (*ante*, p. 34); *Lionberger v. Rouse*, id. 468 (*ante*, p. 41); *Providence Institution for Savings v. City of Boston*, 101 Mass. 575 (*post*).

By the express terms of the act of Congress, shares in National banks are declared personal property. Independent of such declaration, they would have been so regarded. The purpose of the revenue law of 1868, expressed in more than one section, was to impose a tax on all property, real and personal, not specially exempted, taxable by the State. The 6th section enumerates the property to be listed for taxation, specifies all real property, specific personal property, and then concludes, "all other property, real or personal, not otherwise specified herein, or exempt by law from taxation, and its value." Pamph. Acts, 1868, p. 301. The 11th section declares, "that there shall be, and hereby is, levied on all property in this State, real and personal, not herein exempt from taxation, an annual tax of three-fourths of one per cent." Id. 303. There is no exemption of shares in a National bank, or of any corporate property, except of municipal, educational, or religious corporations, or of unsold and uncultivated lands donated by Congress to railroads. There is an exemption of "all shares of the capital stock of any company or corporation which is required to list its property for taxation in this State." Pamph. Acts, 1868, p. 299. This exemption is applicable only to shares of the stock of corporations the capital of which consists of property the corporation is required to list for taxation. The shares represent the interest of the shareholder in such property; and as the property is taxed, to avoid double taxation, the shares are exempt. The capital of the National bank in which the appellant holds shares consists largely, if not entirely, of the bonds of the government of the United States, which the bank is not required to list for taxation, if it consists, and it is almost impossible to conceive that it may, of any property the bank is required to list for taxation, the record does not disclose it. This exemption we cannot suppose has any reference to National banks.

We do not deem it necessary to inquire whether the revenue law of 1868 specifically enumerates shares in a National bank as a subject of taxation. It does not; as we have already intimated, they

## State v. Tuller.

are embraced under the general terms, "all other property, real or personal," not specially enumerated or specially exempt. It has not been suggested, nor could it have been, that the tax assessed against the shares of appellant were greater than that assessed on other moneyed capital. To such tax they are liable, and it appears to have been properly assessed.

The judgment of the Circuit Court is affirmed.

## STATE V. TULLER.

(34 Connecticut, 280.)

*Embezzlement and larceny by officers and servants of National banks. Jurisdiction of State courts of the offense.*

A State statute prescribed punishment for any officer or servants of any bank "incorporated by authority in this State" who should purloin, etc., any moneys, etc., belonging to or deposited in such bank. *Held*, (1) to apply to tellers of National banks; (2) that a teller of such bank could be punished under the statute for purloining property deposited with the bank for safe-keeping, but (3) *semble* that such teller could not be punished under the statute for purloining or embezzling the property of the bank.\*

State courts have no jurisdiction of offenses created by act of Congress, and, therefore, such courts cannot punish officers of National banks for embezzling the property of the bank; but State courts can punish such officers for purloining the property of others.†

# INFORMATION for theft and embezzlement.

The first count of the declaration charged, in substance, that the defendant Tuller stole sundry bonds and notes issued by the United States. The second count charged, in substance, that said Tuller was, on September 4, 1866, a teller in the Hartford National Bank, located in Hartford, Conn., and that on or about said date, while acting as such teller, he fraudulently and feloniously took and purloined from the banking-house of said bank, and secreted, embezzled and appropriated to his own use, ten other bonds of the United States, which were fully described, the property and estate

\* See *United States v. Taintor*, ante, p. 256 and note.

† See *Missouri River Telegraph Co. v. National Bank*, post, 401; *Newell v. National Bank*, post.

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of Loyal Wilcox, of said Hartford, and which had been by him deposited with said bank for safe-keeping.

The evidence supported the declaration, and the defendant was convicted. The defendant moved for a new trial.

*N. Shipman and Robinson*, for the motion.

*C. Chapman and McFarland*, *contra*.

BUTLER, J. [After deciding several points of practice.] Several important practical questions are raised upon the motion for a new trial, and upon the eight requests to charge made by the defendant to the court. The import of the first, second, fifth, sixth and eighth requests is, that the prisoner could not be convicted under the second count of the information. The claims involved in those requests are, first, that the information would not lie under the statute of this State, because that statute does not embrace tellers of National banking associations; second, because the package was not the property of, or a deposit in the bank, within the meaning of that act; and third, that the court had no jurisdiction of such an offense, because the Legislature had no constitutional right to apply it to a National bank. These claims we will consider in their order.

The first claim is not founded. The statute is made to apply to *all banks* incorporated by authority *in* the State. The language of the statute was originally *of* the State, and was changed by the revisers and General Assembly in 1866. These alterations and the general language of the first clause of the act, taken in connection with the particular language subsequently used, sufficiently show the intention of the Legislature to embrace tellers in the National banks. Although termed banking associations in the act by which they are incorporated, they are created to do a banking business, and are universally known as “banks,” and that is the name generally assumed by them in cases where they had previously existed under a State law, and re-organized under the National law. Such is the name assumed by the institution in question, and such was the name applied to it by the counsel for the prisoner in their requests to the court. It is very clear, then, that the revisers and the Legislature intended the statute to apply to tellers of the National banks doing business in the State.



The second claim is also without foundation. The property is not laid in the second count as the property of the bank; but as a special deposit by a third person, differing from money deposited on general account, intended by both parties to be mingled with the assets of the bank, and to become its property. These special deposits are very common, and that fact, and the language used, taken in connection with the provisions in respect to the persons who may be defrauded, makes it very clear that the Legislature intended to provide for just such a case.

It seems equally clear that the third claim is untenable. It is undoubtedly true that the laws of Congress, if operative at all, are supreme and exclusive, and that offenses against them are not cognizable by the State courts. And it seems to be settled in this State by the case of *Davison v. Champlin*, 7 Conn. 244, and by high authority elsewhere, that Congress has no power to give the courts of the States criminal jurisdiction in respect to offenses against Federal laws. It follows therefore that the Legislature have no power to constitute such offenses cognizable by our courts. So far as they have attempted to do any such thing by the statute in question, the statute is inoperative. But a statute may be good and operative in part and in part inoperative.

Congress, by the National Currency Act, incorporated the bank in question as a bank located within this State. They enacted all the provisions which were necessary to constitute it a corporation and give it being, and all of power or restraint that they deemed essential to regulate that being. They authorized it in general terms to do a *banking business*, but they did not undertake, by any regulation or restraint, to regulate that business; and they left that to be regulated by the laws of the State and land. They did enact in the 55th section of the Currency Act, that if any teller or other officer of the bank should embezzle the *property of the bank* they should be punishable by fine and imprisonment. That provision goes to the being and internal working of the bank, and is intended to protect its property from its agents. It was not intended to regulate and has not the effect of regulating the business of the bank with its customers. Now the business of the bank is conducted within the jurisdiction of this State, with our citizens, and in conformity to our laws, and it is competent for the Legislature to pass any laws affecting that business, or protect the bank or its customers in the conduct of that business by

any penalty, and such law and penalty will not be predicated on any law or offense created by Congress, or have any relation or be repugnant to the Currency Act, or in any manner infringe the jurisdiction of Congress or the Federal courts. It is theft by our law to steal from a National bank ; it is burglary to break into one for the purpose of stealing ; and it is cheating to obtain money from one by false pretenses. As a corporate being, located in the State, its property and interests and business are protected by State laws and subject to State legislation, and so it is competent for the legislature to protect its customers, the citizens of the State, in their *business dealings* with it, whatever they may be, whether constituting the relation of borrower and lender or of special or general depositor and bailee ; and they may be controlled and protected by penal enactments, without interference with the laws of Congress.

Such is the character of the statute in question. It is in part repugnant to the law of Congress, but it also protects a special depositor of the bank against the felonious or fraudulent appropriation of the deposit by the agents of the bank, who have access to it, and so far forth it is not open to the objection urged.

The import of the third and fourth requests, if I correctly understand them, is that there could be no conviction under the first count for larceny, if the prisoner took the package entire and unbroken from the bank ; but it is not a case for the application of the principle claimed. It is not alleged, nor was it attempted to be proved, that the prisoner *received* the package, or that he was *intrusted* with it, or that he ever had any *care* or *possession* of it. All that is alleged or could be proved is, that he had *access* to the place of deposit. There being no trust, or possibility of the breach of trust, no possession nor custody, the technical rule in relation to the breaking of a package is entirely inapplicable. Moreover, it appears, without denial upon the motion, that he did dispose of the contents in parcels, and must, therefore, have broken the package at some time.

[The remainder of the opinion was devoted to a consideration of a question of practice.]

In this opinion all the other judges concurred, except McCurdy, J., who dissented.

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The Chattahoochee National Bank v. Schley.

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## THE CHATTAHOOCHEE NATIONAL BANK V. SCHLEY.

(58 Georgia, 369.)

*Liability of National banks as to deposits for safe-keeping — Power to withdraw deposits.*

A National bank which habitually receives special deposits for safe-keeping as matter of accommodation, is bound by the act of its cashier in receiving on special deposit, a package of stocks and bonds. The bank, though acting without reward, becomes a bailee and is responsible for gross negligence.\*

If a person withdraws from a bank a special deposit, in pursuance of authority conferred upon him by the depositor, the bank is discharged, though at the time its officers were not aware of his authority.

Written authority indorsed on a certificate of deposit of stocks and bonds to pay to a certain person dividends or coupons is no authority for surrendering the stocks and bonds themselves.

**T**ROVER by Eliza Schley as guardian against the Chattahoochee National Bank, to recover the value of certain bonds left with the bank for safe-keeping, and which the bank failed to return on demand.

At the time the bonds were left the assistant cashier of the bank gave a receipt, specifying the bonds and stating that they were received "on special deposit." On the back of this receipt Mrs. Schley indorsed the following: "Will pay above dividends and coupons to" a person specified.

The person so specified afterward called at the bank, received the bonds and never returned them again.

The bank had occasionally accommodated its friends by allowing them to place valuables in its vaults for safe-keeping. It, however, made no charge therefor, and there was no charge made to nor compensation expected from Mrs. Schley.

On the part of the bank it was also proved that when they

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\*The first proposition of the head note, and which is but a repetition of the first proposition of the opinion, is *obiter* — that question not arising in the case. It is also contrary to the decision of the Supreme Court of Vermont in *Wiley v. The First National Bank*, *post*, and to the decision of the Court of Appeals of New York, in *First National Bank v. Ocean National Bank*, *post*. It is, however, supported by the decisions of the Supreme Court of Pennsylvania in *First National Bank v. Graham*, *post*; *Scott v. National Bank*, *post*. See *The Third National Bank v. Boyde*, *post*, and *Turner v. First National Bank*, *post*, and notes to above cases.—REP.

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received the bonds in question, their assistant cashier, who was the only officer of the bank that knew of the transaction, or ever knew that the bonds were on deposit, refused at first to give a receipt, saying that the bank would not be responsible for them, but upon its being represented that all that was wanted was a memorandum to show the numbers and amount in case of accident, such memorandum was given, stating simply that the bonds specified were received on special deposit.

The evidence tended to show that Mrs. Schley had orally authorized the person who received the bonds from the bank to use them, though such authority was not known to the bank at the time the bonds were delivered to him.

The officers of the bank testified that there was no rule, law, or by-law of the bank authorizing the deposit of valuables for safe-keeping; but that they had allowed friends to place in their bank-vault valuable packages, but without any idea that the corporation would thereby be made liable.

The jury rendered a verdict for the plaintiff for the value of the bonds, and defendant moved for a new trial, which was denied.

*Johnson & Ingram, and R. J. Moses, for plaintiff in error.*

*Thornton & Grimes, for defendant.*

BLECKLEY, J. 1. A National bank that habitually receives special deposits for safe-keeping, as matter of accommodation, is bound by the act of its cashier in receiving, on special deposit, a package of stocks and bonds. The bank, though acting without reward, becomes a bailee, and is responsible for gross negligence. *Lancaster Bank v. Smith*, 62 Penn. St. 47; Code, §§ 2104, 2105. Compare *Wiley v. First National Bank*, 47 Vt. 546; *First National Bank v. Ocean National Bank*, 60 N. Y. 278; *Weckler v. First National Bank*, 42 Md. 581; *Foster v. Essex Bank*, 17 Mass. 479.

2. If a person withdraws from a bank a special deposit, in pursuance of authority conferred upon him by the depositor, the bank is discharged, though the authority be unknown at the time to the corporation, or to the officer representing it in the transaction.

3. Written authority, signed by the depositor, on the certificate of deposit, in these terms: "Will pay above dividends or coupons

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McVeagh v. The City of Chicago et al.

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(naming a particular person) for my account," will not justify the bank in parting with possession of the bonds themselves and the certificates of stock described in the certificate of deposit, though possession be yielded to the person thus named.

4. In charging the jury, it is not appropriate to say to them that they are to determine what is in evidence, or that it is for them to settle what is in evidence. Phraseology like this might mislead by inducing them to suppose that they were to consider the *competency* of the testimony, as well as its credibility and effect.

*Judgment reversed.*

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MCVEAGH v. THE CITY OF CHICAGO ET AL.

(49 Illinois, 318.)

*Taxation of National bank shares — Method of taxation—Deductions for debts —Payments of tax, how compelled.*

The provision of the act of June 13, 1867, requiring the assessment of shares in banks to be made for the year 1867, with regard of the first day of July, 1867, instead of the first day of the preceding April, does not violate the principle of equality and uniformity established by the Constitution.

But if, in making an assessment under that act, the valuation of the shares was determined on the first day of July, and the law required it should be determined as of the first day of April, it would be necessary for the owner of the shares, calling upon a court of equity for relief, to show that he was injured thereby — that by reason thereof, the valuation put upon them on the first day of July was greater than they justly bore on the first day of April preceding, or that he was compelled to pay a double tax, first on the money listed for taxation on the first day of April, and again on the bank shares he purchased with this same money between that day and the first day of July.

Where a particular species of property has been omitted from taxation for a given year, the Legislature have the power to pass a special law to cure the omission.

So the tax on National bank shares, not having been equally assessed for the year 1867, by reason of the defective law under which it was attempted, the act of June of that year was designed to supply the omission, and there was no want of constitutional power to enact it.

In assessing the shares in National banks under State authority, it is not necessary that they shall be included in the list of the personal property, so that upon aggregating the personal property, shares included, the taxable

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portion would be shown by what remained after the reduction for debts was made, as provided by the general revenue law. It is quite immaterial on what portion of the list these shares are found.

Under the act of 1867, a system of taxation for bank shares was designed, peculiar to itself, and independent of the general revenue system of the State. The only deduction allowed by the act, from the shares of each owner, is a proportionate sum for the real estate in which a portion of the capital might be invested. No deduction for debts owing by the owner can be made from the valuation of his bank shares.

Nor is this discrimination in not allowing a deduction from the valuation of bank shares, for debts owing by the owner, as is allowed to be made from the valuation of other personal property under the general revenue law of the State, contrary to the limitations imposed by the provision of the 41st section of the National Banking Act of June 3, 1864, which provides that shares in these banks shall not be taxed under State authority "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such States." The "rate" of taxation is not affected by the different modes adopted to ascertain the taxable value of the various kinds of property.

Should a collector be compelled to sell the bank shares for the non-payment of taxes, under the act of 1867, and the bank refuse to transfer them to the purchaser on the books of the bank, a court of chancery, on a bill filed for such purpose, would compel the transfer.

Or if the taxes upon such shares remain unpaid through the dividends, as provided by this bank, the State could by *mandamus* compel the officers of the bank to appropriate the dividends, or such portions as might be necessary to pay the taxes.

No actual notice of the assessment of bank shares is required to be given to the owner, the act requiring only that notice shall be published in a newspaper a certain length of time.

**W** RIT of error to the Circuit Court of Cook county; the Hon. ERASTUS G. WILLIAMS, Judge, presiding.

The opinion contains a sufficient statement of the facts in this case.

*Mr. Melville W. Fuller and Messrs. Mattocks and Mason, for plaintiff in error*

*Mr. G. A. Irvin, for defendants in error.*

Mr. Chief Justice BREESE delivered the opinion of the court.

This was a bill in chancery in the Cook Circuit Court, instituted by Franklin McVeagh against the city of Chicago, to restrain the collections of the taxes assessed by the authorities of that city on

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certain shares of stock held by complainant in the Commercial National Bank of Chicago, on the allegation, among others, that the act of the General Assembly, of June 13, 1867, was unconstitutional and void so far as it provides for taxation in respect to bank shares of the year of 1867, and that the assessment was void because contrary to the first proviso of section 41 of the National Banking Act, in these particulars, that the shares in question were not included in the valuation of the personal property of the owner, and that the assessment and tax are void, because the shares are placed in the valuation at a greater rate than other moneyed capital, no deductions being allowed for debts due and owing by the shareholders, and because the act of 1867 is contrary to the National Bank Law.

A demurrer was sustained to the bill, and a judgment rendered against complainant for costs, to reverse which, assigning as error, sustaining the demurrer to the bill. The several points made by the bill are argued at great length, and we have given them full consideration.

The first objection implies a want of constitutional power in the Legislature to enact the law. That must be shown by the party making the charge, the presumption being that every law passed by the Legislature is in conformity with the Constitution, unless the contrary be shown, and it must be, as this court has often decided, a clear and palpable case, before this court will undertake to decide an act of co-ordinate department of the government was beyond their constitutional competency to enact.

The argument of counsel in support of this objection is founded on the fact that, inasmuch as appellant's shares were not assessed on the first day of July thereafter, for the year 1867, for that would violate the principle of equality and uniformity established by the Constitution.

An examination of the revenue law of the State has not shown us that the shares should be assessed for taxation on the first day of April. Indeed, it would be impracticable so to do, as the assessment may require months to complete it. This assessment was for municipal, not State purposes, and if the charter of the city required the assessment to be made on the first day of April, and it was not so done, or it could not be, then it should be shown that an injury has resulted by making the assessment on a different day.

Admit the valuation of appellant's shares was determined on the first day of July, and the law required it should be determined as of the first day of April, surely it would be necessary for appellant, calling upon a court of equity for relief, to allege and prove he has been injured thereby, that by reason thereof his shares have been valued too high, or that there was a difference in their value on the two specified days, being higher on the first day of July than they were on the first day of the preceding April, whereby he would be compelled to pay a greater tax. No such matter is alleged in the bill of complaint. If no injury has been occasioned by the act of which complaint is made, or omission to act in strict compliance with the law, it is certainly incumbent on complainant to show that in his case the tax assessed against him at the time charged, violated the principle of uniformity and equality required to be observed by constitutional provisions and by decisions of this court.

The great central idea of our Constitution in this behalf, as we have before said in *The Supervisors of Bureau County v. C. B. & Q. R. R. Co.*, 44 Ill. 229, was equality of taxation, so that one man or corporation should not be required to pay a greater tax on the same description of property, than another in the same locality.

In what way the violation here complained of violates this principle is not perceived. It is not alleged or pretended that in taxing appellant's shares, a discrimination has been made to his prejudice, or that he has paid a double tax, first on the money listed for taxation on the first of April, and again on the bank shares he purchased with the same money between that day and the first day of July.

We cannot perceive wherein the act violates the Constitution. It is not claimed appellant has paid any tax whatever upon the money with which he purchased these shares, nor is it shown they have been valued higher than like shares in the same institution, or that the valuation put upon them on the first day of July was greater than they justly bore on the first day of April preceding.

It is admitted, taxation of a property owner should be by the operation of a general law affecting all classes of people, but where a particular species of property has been omitted from the taxation for a given year, where is the inhibition upon the Legislature to pass a special law to cure the omission? Such is the nature of the



law in question. The tax on bank shares was not properly assessed, they were not, in fact, assessed by reason of the defective law under which it was attempted. This act was designed only to supply that omission, and we must give it effect, not being convinced of the want of constitutional power in the Legislature to enact it.

The next objections, that the sixth section of the act is void, being contrary to the limitation imposed by the proviso of the 41st section of the National Banking Act of June 3, 1864, in prescribing a mode of taxation different from that applied to other personal property, whereas the bank act requires the shares to be included in the list of the personalty of the owner delivered to the assessor for taxation, and that the shares are placed in the valuation at a greater rate than other moneyed capital, no deductions being allowed for debts due and owing by shareholder.

The argument is, taking the objections together, as they should be so taken, having such an intimate connection, that the shares should have been included in that list, so that, upon aggregating the personal property, shares included, the taxable portion would be shown by what remained after the deduction for debts was made, and that the policy of the law is that a man shall be taxed on what he is worth, at least so far as personal property was concerned.

The objections are satisfactorily answered by considering the proviso of the act of 1864, and the connection of our act of 1867 therewith.

That provision is as follows :

*“ Provided, That nothing in this act shall be construed to prevent all the shares in any of the said associations held by any person or body corporate from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State.”*

The sixth section of our act is as follows:

**SEC. 6.** All assessments of the capital stock of banks organized under the laws of this State, or of the property of such banks, made for State, county, or municipal purposes for the year A. D. 1867, by virtue of the laws heretofore in force, are hereby vacated and declared to be void and of no effect; and it is hereby made the duty of the assessors of the several counties and towns, cities or districts in the State in which such banks so organized, or in which any

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banks or banking associations organized under the laws of the United States are or may be located, to assess the shareholders in the same upon the value of their shares, and to assess the real estate, if any, in which any part of the capital stock of such banks or banking associations is invested, in the same manner and subject to the same regulations, except as provided in this act, as provided by law for the assessment of other real and personal property, in the same county or town, city or district, such assessment to be made for the year 1867, with regard to the ownership and value of such shares on the first day of July, 1867, and annually thereafter with regard to the ownership and value of the same on the day which may be specified by the laws in force concerning the assessments of other taxable personal property in this State."

The object of this section is quite apparent, being plainly expressed. Assessments before its passage had been made for revenue purposes, upon the capital stock of these banks, and the taxes were in process of collection. This act vacated the assessments, and put a stop to the collection of that tax, and to supply the deficiency in the revenue, which would be thereby occasioned, the assessors were required to assess the shareholders in the banks upon the value of their shares. The act of Congress did not intend to prescribe a mode by which alone the State could tax the shares. That was for State legislation, under the limitations and restrictions prescribed by the act. To get at the shares, it would be proper to require them to be included in the valuation of the personal property, not that they should, but might, occupy a different column in the list. It cannot be understood to mean, as appellant's counsel insist, that it should be included in such valuation, to enable the shareholders to deduct from their value such debts as he might owe, as required by the general revenue law. To us it appears that this part of the proviso was intended merely to indicate to the assessors in making up the assessment roll, to place the value of the shares in the column in which personal property is placed separately, so as to show its separate amount.

In this particular case, the shares could not be included in the valuation of the personal property, for that had been made long before the passage of this act, and the act was intended to supply an omission, as we have before said, and could not contain such a provision. The great object intended by the proviso was that the shares should be assessed at the place where the bank was located, and that they could not be assessed at a greater rate than should be assessed upon other moneyed capital in the hands of individual citizens.

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But is the appellant entitled to the deduction he claims? For, if he is not, the first objection is quite immaterial, no matter where, on what portion of the list, those shares are found. If it had been the intention of the Legislature to permit a deduction, they would have used language indicative thereof, by declaring that the bank shares shall be taxed like other property. Having been denied the right to tax the capital stock of the banks, the Legislature declares that the shareholders shall be assessed and taxed on the value of their shares, by which mode as much revenue would be derived as from the former exploded mode:

The language and subject of the act are plain. This is the first section:

“ Hereafter no tax shall be assessed upon the capital of any bank or banking association, organized under the authority of this State, or organized under the authority of the United States and located within this State; but the stockholders in such banks and banking associations shall be assessed and taxed on the value of their shares of stock therein in the county, town or district where such bank or banking association is located, and not elsewhere, whether such stockholders reside in such town, county or district, or not, but not at any greater rate than is assessed upon other moneyed capital in the hands of individual citizens in this State. And in case any portion of the capital of such bank or banking association is invested in real estate, then there shall be deducted, in making the assessment of such shares, from the value of the same, such sum as shall bear the same proportion to the value of such shares, as the assessed value of all such real estate bears to the whole capital stock of such bank or banking association ;

“ *Provided*, that nothing herein contained shall be held or construed to exempt from taxation the real estate held or owned by any such bank or banking association, but the same shall be subject to State, county, municipal and other taxation, to the same extent and rate, and in the same manner, as other real estate is or may be taxed.”

The old system of taxing banks on their capital stock being exploded, this new system was devised, by which an amount of revenue would accrue, equal to that derived from taxing the capital stock. The only deduction allowed by the act, from the value of the shares of each owner, is a proportionate sum for the real estate in which a portion of the capital might be invested.

Appellant's case is not governed by the general law, but by this act, and we look in it in vain for any sanction to the claim for deduction on which he insists. The intention of the Legislature is further evident from the second section of the act, which is as follows:

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" SEC. 2. There shall be kept, at all times, in the office where the business of such bank or banking association, organized under the laws of this State, or of the United States, shall be transacted, a full and correct list of the names and residences of all the stockholders therein, and of the number of shares held by each, and such list shall be subject to the inspection of the officers authorized to assess taxes or to assess property for taxation, during the business hours of each day in which business may be legally transacted; and it shall be the duty of each county, town, city or district assessor to ascertain and report to the county clerk of his county, or the other proper officer, as a part of his return of the assessment of property, a correct list of the names and residences of all stockholders in any such bank or banking associations located in his county or town, with the number and value of all such shares held by each of them respectively, showing the name of such banks or banking associations in which such shares are held; and such return shall also show what deduction, if any, is to be made from the value of such shares on account of the investment of any of the capital stock of such bank or banking association in real estate, as set forth in the first section of this act."

A deduction for real estate investment being specially named, excludes the idea of any other deduction. It is quite apparent that owners of bank shares, under the system inaugurated by this act, were not intended to be placed on the same footing with owners of other personal property. The object of this act was to supply the place of a system which has been overturned by a decision of the Supreme Court of the United States, in Bradley's case, and to substitute for the capital stock the full shares into which that stock was divided, without any deduction save for investments in real estate, and which was taxable as other real estate, and thus obtain from the bank and the shareholders together as much as it did before from tax on the capital.

That a new system was devised, is further discoverable from section 4:

" SEC. 4. The collector of taxes, and the officer or officers authorized to receive taxes from the collector, may all, or either of them, have an action to collect the tax assessed on any share or shares of stock owned by non-residents of this State, from the avails of the sale of such share or shares; and the taxes assessed against such share or shares shall be and remain a lien thereon till the payment of said tax."

No such provision as this is found in the revenue law, nor is such an one as is contained in section 5, found in it:

" SEC. 5. For the purpose of collecting such taxes, and in addition to any other law not in conflict with the Constitution of the United States, relative to the imposition of taxes, it shall be the duty of every such bank or banking

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association, and the managing officers thereof, to retain so much of any dividend or dividends belonging to such stockholders as shall be necessary to pay any taxes assessed in pursuance of this act, until it shall be made to appear to such officers that such taxes have been paid; and any officer of any such bank, who shall pay over or authorize the paying over of any such dividend, or any portion thereof, contrary to the provisions of this section, shall thereby become personally liable for all such tax, and if the said tax shall not be paid, the collector of taxes where the bank is located, shall sell said share or shares to pay the same, like other personal property."

In view of this legislation, it must be apparent that a system of taxation for bank shares was designed, peculiar to itself and independent of the general revenue system of the State.

No deduction being allowed under this system, except for investments in real estate, the objection that the shares are valued at a greater rate than other moneyed capital of the State falls to the ground. Value of property is one thing, and the rate at which it shall be taxed is entirely different. Rate is the proportion or percentage which property shall bear, no matter what its value. It does not vary as values vary, but it is always the same. One per cent or three per cent on an ascertained valuation applies to all property equally, however much the values may differ. The meaning of the act evidently is, that the rate or percentage of taxation on bank shares shall be no greater than the rate imposed on other property. No violation of the act is shown in this regard.

This provision of the fifth section is attacked by appellant, on several grounds. We do not deem it necessary to defend it, as the remaining portions of the act would be effectual for the purpose intended, if that was stricken out, save the last clause, to which no objection has been made. Under that clause, should a collector be compelled to sell the shares for non-payment of the taxes, and the bank refuse to transfer them to the purchaser on the books of the bank, a court of chancery, on a bill filed for such purpose, would compel the transfer. But on principle, we can perceive no valid objection to the section.

The State is entitled to its revenues. It has a right to use all the means, summary or otherwise, not prohibited by a higher power, to collect them. In case of bank shares, if they are taxed and the tax remains unpaid through the dividends as provided by this law, the State could by *mandamus* compel the officers of the bank to appropriate the dividends, or such portions as might be necessary to pay the taxes.

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This question is fully discussed by the Court of Appeals of Maryland, in the case of *The State v. Mayhew*, 2 Gill, 487, in most of the reasoning of which, and in the conclusion, we concur, and are in accordance with what we have said above.

Upon the last point made, that appellant has no notice of the assessment, it is sufficient to say, that it is not necessary he should have actual notice, the law requiring only that notice of the assessment should be published in a newspaper of the city, a certain length of time. It is not denied such notice was given.

Perceiving no error in the record, the decree dismissing the bill must be affirmed.

*Decree affirmed.*

## FIRST NATIONAL BANK OF MENDOTA V. SMITH.

(65 Illinois, 44.)

*Taxation of National banks — Place where taxable — Power of Legislature to fix situs of shares for taxation — Nature of shares.*

A State statute providing that shares of stock in National banks shall be taxed in the county, town, or districts where such banks are situated, whether the shareholders reside in such county, town, or district or not, is valid.\*

*Semble*, that shares in National banks are in the nature of *choses in action*. They are mere demands for dividends as they become due. The certificates of stock are merely evidence of the holder's title to a given share in the property and franchises of the corporation of which he is a member. The bank is the trustee of the stockholders, who must come to its counter for their dividends and their share of assets on final liquidation, and no transfer of stock can be completed until shown upon the books of the bank.

**A** PPEAL from the Circuit Court of La Salle county; the Hon. EDWIN S. LELAND, Judge, presiding.

*Frank J. Crawford and Crooker & Hunter*, for appellant.

*Mayo & Widmer*, for appellee.

Mr. Justice McALLISTER delivered the opinion of the court.

This was a bill in equity exhibited in the Circuit Court of La

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\* The doctrine of this case is affirmed by *Tappan v. Merchants' National Bank*, ante, p. 100, where in the same statute was construed.—**REP.**

Salle county, by the First National Bank of Mendota, against the tax collector of the township of Mendota, in which the bank was situated, to restrain the collection of the taxes assessed for the year 1871, against the stockholders of the bank, upon their respective shares of stock. The defendant demurred to the bill. The court sustained the demurrer, and no amendment of the bill being proposed, it was dismissed. The complainant appealed to this court.

The ground upon which the bill seeks to restrain the collection of these taxes is, that the taxes are levied in La Salle county against all the shareholders, while only a part of them reside in that county, and the others reside in Bureau county. The position taken is, that there is no power to levy the tax against the shareholders residing in Bureau county, because their shares must be considered as having their *situs* only in the county where the holders reside. Therefore the taxes, as respected all that class, were illegal and void, and being illegal and void as to them, they were likewise as to stockholders residing in the county where the bank is located, by operation of the rule of the Constitution requiring uniformity. For these reasons, and because the bank is trustee of all the stockholders, it is insisted that upon the ground of avoiding multiplicity of suits, the bill can be maintained by the bank.

The propositions upon which this bill is based, when specifically stated, are briefly these: (1) That in order to a valid tax the Legislature must have power or jurisdiction over the person or property in the county where the tax is authorized to be levied. (2) That, inasmuch as a portion of the owners resided out of the county, though in the State, and the *situs* of their shares was at their domicile, the Legislature was powerless to change that *situs*, so that there could be no jurisdiction of either the person or property in the county of the bank, and, therefore, as to all that class of owners, the tax was void. And, lastly, inasmuch as the tax was void in respect to owners of shares who *did not* reside in La Salle county, the tax was likewise, under the constitutional rule of the State requiring uniformity and equality, void in respect to those who *did* reside in that county.

The 41st section of the act of Congress passed in 1864 expressly recognizes the right of the States to tax all shares in the stock of National banks. Notwithstanding this recognition, the right was

soon denied by the banks ; and the question first came before this court in the case of *The People v. Bradley*, 39 Ill. 130. It was there held that the stock was taxable, as had previously been held by the Court of Appeals in the cases of *The City of Utica v. Churchill*, and *Van Allen v. Supervisors*, 33 N. Y. 162.

In *Bradley's* case, as in the New York cases, the tax was levied upon the capital stock of the bank in the aggregate, and not upon the individual shareholders. These cases were taken to the Supreme Court of the United States, and reversed upon the sole ground that the tax must, under the act of Congress, be levied upon the individual shareholders. 3 Wall. 572 ; 4 id. 459. In this mode, it was held the shares could be taxed.

In obedience to this decision of that court, our Legislature, in 1867, passed an act requiring the taxes to be assessed upon the individual shareholders "in the county, town or district where such bank or banking association is located, and not elsewhere, whether such stockholders reside in such county, town or district or not."

Having successfully resisted the attempt to tax the stock of the bank as a corporation, as appears by the cases referred to, it is now sought to prevent taxation of the stockholders upon their shares. This language is considerably employed, and it is believed to be not too broad ; because, as will be presently seen, if the grounds now taken on behalf of the stockholders are maintainable, it will only be necessary that the stock of the various National banks in the State shall be held in the name of non-residents, in order to withdraw the shares altogether from the reach of State legislation for taxation.

Before proceeding further in this case, it should be observed, that the question involved depends entirely upon the laws of this State, and is in no manner embarrassed by any act of Congress.

The 41st section of the act of Congress above referred to, under which these banks are organized, required State taxes to be imposed "at the place where the bank is located, and not elsewhere." But by an act of February, 1868, Congress declared these words—"place where such bank is located, etc.," to mean "the State in which the bank is located and not elsewhere."

This provision places the shares in such banks under the taxing power of the State wherein the bank is located, and prohibits their being subject to State taxation elsewhere. This limitation, with the further ones that the taxation imposed should not be at a greater



rate than upon other moneyed capital in the hands of individual citizens of the State where made; and that the tax so imposed, under the laws of any State, upon the shares of the association authorized by that act, should not exceed the rate imposed upon the shares of any of the banks organized under the authority of the State where such association is located, constitute the only limitations by Congress on the taxing power of the State where the bank is located, none of which have any application to this case. Our Legislature was therefore left at liberty to impose the same tax upon the value of shares in National banks located here, which it could upon any other moneyed capital of our citizens, and fix the *situs* of such shares in its discretion, unless restrained by our own Constitution. We have made this reference to the acts of Congress in order to show that the questions involved depend solely upon the laws of the State, and are in no respect embarrassed by any laws of Congress.

We will now consider the validity of the arguments urged in favor of the exemption of stockholders of such banks located within this State, from State taxation, under the act of 1867.

The counsel for appellant cite as authority the case of *The Union National Bank v. The City of Chicago*,\* decided in 1871 in the Circuit Court of the United States for the Northern District of Illinois. We have been furnished with a copy of the opinion delivered in that case, and have given it a very careful examination. The same question now under consideration was presented there, and was decided adversely to the right of taxation upon the same grounds which are urged by counsel for appellant in the case before us. While we have great respect for the opinion of the learned district judge who decided that case, we find ourselves unable to concur either in his reasoning upon the question or the conclusion at which he arrives.

In order that the position of the court in that case, and that of the counsel for the appellant in the case before us, may be fairly stated and understood, we quote the language of the court, whose reasoning the counsel for appellant adopt as the principal foundation for their argument.

After giving the clauses of our State Constitution of 1848, requiring uniformity in taxation, the opinion proceeds as follows :

\* The doctrine of this case having been overruled by *Tappan v. Merchants' National Bank*, *ante*, p. 100, the case is not included in this volume.—REP.

“And by a series of adjudications of the Supreme Court of Illinois, it has become settled law that these provisions are *restrictions* upon the power of taxation by the Legislature, or any authority under it. All taxes therefore assessed by municipal corporate authorities must be proportionate and uniform within the jurisdiction of the body imposing them. Where there is jurisdiction neither of the persons nor property, the imposition of a tax would be *ultra vires* and void. Jurisdiction is as necessary to valid legislative as to valid judicial action.

“Shares of stock are incorporeal personal property, and as such, are held incapable of having any *situs* save at the domicile of the owner. In the eye of the law they have in themselves no locality. They accompany the person of the owner where he goes, and he may deal with them and dispose of them according to the law of his domicile, which, if he die intestate, governs their disposal. The act of June 13, 1867, directs taxes to be assessed by the authorities of counties, towns, cities and districts upon the shares of these banks in the county or town where the bank is located, without regard to the *residence* of the owner of the *situs* of the shares, and in that respect I regard it as a violation of the Constitution of the State.

“The complainants show, and it is not denied, that their shareholders are scattered over the State, and such taxation upon them appears to me a clear infringement of the constitutional requisition that all assessments by the corporate authorities of cities, etc., shall be uniform in respect to persons and property within their limits. This compels the taxation of the stock owned by residents of the State in the county, city, town, or district where they reside, for the purpose of collecting county, city, town, or district taxes, and a failure to do so destroys the rule of uniformity with respect to property within the limits of the body imposing the taxes, while neither the persons nor property are within the jurisdiction of the taxing power at the place of the bank's location.

“If then this statute is void as to those who do not reside in the district where the bank is located, it must be as to those who do; because it would then be undeniable that every person would not be obliged to pay a tax in proportion to the value of his or her property, and the tax for State purposes would not be levied with uniformity. And if the law be not valid as to shares of stock belonging to residents, the shares of non-residents cannot be taxed,

because the provisions of section 41 of the act of 1864 inhibit any tax upon non-residents that is not imposed upon residents of the State, and such a regulation would be in conflict with the Federal Constitution, which says: 'the citizens of each State shall be entitled to all the privileges and immunities of the citizens of the several States.' I cannot avoid the conclusion that this law violates the imperative rule of the Constitution."

There are two vital points involved in the foregoing reasoning and conclusion which challenge serious attention. One is, in effect, that all shares in the stock of National banks in this State, though claiming and receiving the protection of our laws and of our State and municipal governments, will wholly escape State, county, town or district taxation if owned by non-residents of the State, and will be beyond the reach of any statute the Legislature can pass. Neither can they be taxed where the owner resides.

They will thus escape taxation anywhere, although by the act of Congress under which these banks are created, there is a clear and manifest intention that stockholders should be subject to taxation in the State where the bank is located. The reasoning is, that they cannot be taxed in this State because, by a mysterious and indissoluble tie, the *situs* of the shares is with the non-resident owners. They cannot be taxed where the owners live, because, by the act of Congress, they can be taxed only in the State where the bank is located.

The other point of this decision is, that if an assessor includes in his assessment certain property not legally subject to taxation, not only may the owner of such property enjoin the collection of the tax illegally imposed upon that property, but all other tax payers, though their taxes are thereby lessened in amount, may avail themselves of *his* grievances and enjoin the collection of taxes assessed upon their property; and this upon the theory that the addition to the assessment roll of property not subject to taxation violates the constitutional requirement of equality and uniformity. We are unable to understand how this conclusion is reached. When property subject to taxation is wholly left out of the assessment, it might be contended with much plausibility that uniformity was not attained. But even in that case this court has held that the collection of the tax cannot be restrained by equity. *Merritt v. Farris*, 22 Ill. 511; *Schofield et al. v. Watkins et al.*, id. 66.

And again, in *Dunham et al. v. City of Chicago*, 55 Ill. 357,

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where the omission by the assessors to assess property subject to taxation was set up as a defense to the application for judgment against delinquent lands, it was held by this court that such omission afforded no sufficient ground for declaring the taxes void.

But whatever ground of complaint there might be on the part of the owners of assessed property because other property liable to taxation had been omitted from the assessment, and thus *increasing* their burdens, we are entirely unable to comprehend how tax payers can complain because property *not* liable to taxation had been included. The result to them is simply that their taxes are thereby lessened; which is certainly a very novel reason for asking an injunction.

The case in the United States Circuit Court to which we have been cited, was a bill brought by the bank to restrain the collection of city taxes from any of the shareholders, whether resident or non-resident in the city of Chicago. The shares of the residents were, even in the view of the court, properly taxable there. The shares of the non-residents were, in the view of the court, not within the city, but attached to the persons of their owners, at the domicile of the latter, and were, therefore, not taxable there. For aught that appeared there, all the property in the city *subject* to taxation was assessed. The addition to that assessment of property belonging to non-residents, and not within the city, according to the view of the court, may have been, if that view were correct, a wrong to the non-resident owners, but certainly was none to the resident tax payers, and did not destroy either equality or uniformity of taxation as between them.

We have commented at such length on this position of the Federal court because the same position is taken by counsel in the case before us, on the authority of that decision, and the same relief is asked for the resident stockholders that was granted there.

As is apparent in the extract from the opinion already given, the decision rests upon two propositions: First, that a tax cannot be assessed where there is no jurisdiction of either the person or the property. Second, that personal property has no *situs* of its own, but follows the person of its owner, and if this is not always true of tangible personal property, it is of incorporeal personal property like shares of bank stock.

The correctness of the first proposition is not questioned. It is undoubtedly true that the Legislature could not constitutionally

authorize Cook county to levy a tax upon lands or other property having a fixed *situs* in La Salle county.

The second proposition is correct as a general rule of the common law. It is one of obvious convenience in determining what law shall govern in the distribution of estates of deceased persons. But while it is a rule of the common law, that is all that can be said of it. The fallacy of the reasoning of the Federal court referred to, and of the counsel for the appellant, seems to be in assuming that this rule of the common law cannot be changed by statute. The Legislature, by the act of 1867, certainly intended to change it in regard to bank shares; and to fix their *situs*, for all purposes of taxation, in the county where the bank is situated. The language employed is broad enough to effect the change, and it has been made, if the Legislature had the constitutional power to make it. Where is the constitutional provision which prohibits the change? We have been referred to none; and in what provision lurks the prohibition we confess ourselves at a loss to conjecture. That the decision of the Federal court assumes and is based upon the theory that the *situs* of the shares is inseparable, even by statute, from the person of the owner, is undeniable. Yet we are pointed to no provision of the Constitution prohibiting what would seem to be an exercise of one of the plainest and simplest of legislative powers. That the Legislature can change the rule of the common law in this respect, seems to us a proposition too plain for argument; and if the power had not been practically denied by a court of such respectability we should deem it one so palpably clear as not to admit of controversy.

Story, in his *Conflict of Laws*, section 550, speaking of this question of *situs*, says:

“The general doctrine is not controverted that although movables are for many purposes to be deemed to have no *situs* except that of the domicile of the owner, yet this being but a *legal fiction*, it yields whenever it is necessary for the purposes of justice that the actual *situs* of the thing should be examined.”

The separation of the *situs* of personal property from the domicile of the owner for the purposes of taxation is familiar doctrine in the courts of this country, and has been sanctioned by this court in various cases. In *Wilkey v. The City of Pekin*, 19 Ill. 160, it was held that a resident of that city could not, under the charter, be taxed on personal property not having its actual *situs* within

the city. The *situs* of the property was held, under the charter, not to attach to the person of the owner. In *Mills v. Thornton*, 26 Ill. 300, a like severance of the *situs* from the person, for the purposes of taxation, was again recognized. In the *City of Dunleith v. Reynolds*, 53 Ill. 45, the court held certain personal property within the city subject to taxation, though the owners resided elsewhere. These, it is true, were cases of tangible property. But in the *Board of Supervisors v. Davenport*, 40 Ill. 198, the same principle was applied to property not tangible. It was there held that money belonging to a resident of New York, and sent to an agent in Tazewell county to be loaned, was taxable by the county. The property was a mere *chose in action*, but its *situs* was, by the terms of the Revenue Law, severed from the owner and attached to the agent in this State who loaned the money. It might be said in reference to the latter case that the possession of the agent was that of the principal. If this be conceded, it may also be said that the bank files this bill as trustee of the stockholders; and as such possesses the lawful control over the rights and interests of the *cestuis que trust*, much greater than that of a mere agent for the loan of money.

Shares in joint-stock companies are not, however, strictly speaking, *chattels*, and it has been considered that they bear a closer resemblance to *choses in action*, or, in other words, they are merely evidence of property. They are, it is held, mere demands for dividends as they become due, and differ from movable property, which is capable of possession and manual apprehension. "If," says C. J. SHAW, "a share in a bank is not a *chose in action*, it is in the nature of a *chose in action*, and, what is more to the purpose, it is personal property." Ang. & Ames on Corp. (9th ed.), § 560; *Hutchins v. State Bank*, 12 Metc. 421.

"Certificates of stock," says COMSTOCK, J., in *Mechanics' Bank v. New York R. R. Co.*, 3 Kern. 627, "are not securities for money in any sense, much less are they negotiable securities. They are simply the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation of which he is a member."

Under this view of the law it would seem to be eminently proper for the Legislature to fix the *situs* of property so anomalous in nature, for the purposes of taxation. The question, however, is not whether the act of 1867, under which these taxes were levied,

was just or reasonable, but simply whether it was within the limits of legislative power. If it was not, then there is no power in our Legislature to change any artificial rule of the common law, and many of the acts within our statute books are void for the same reason.

But in our opinion the act of 1867 was not only constitutional, but was also a very proper and even necessary exercise of legislative power. It prescribes no unreasonable rule. It places the *situs* of bank shares where, from the very nature of the property, it ought to be placed for the purposes of taxation. The act of Congress itself contemplates a severance of the *situs* of such shares from the person of their owner, by providing that they should not be taxed except in the State where the bank is established. But apart from this, it is really much more reasonable to fix the *situs* of shares at the place where the bank is located, and where it must continue to do its business or wind up its affairs, than to separate by legislation tangible personal property from the person of its owner. The latter may be in one county to-day, and in another to-morrow. Its actual *situs* is liable to constant change, and the title may be transferred by the owner wherever he may be. But not so with bank shares. The banking corporation has a fixed locality, where it must transact its business, and there wind up its affairs when it ceases to exist. It is the trustee of the stockholders, who must come to its counter for their annual dividends and their share of assets on final liquidation. Its debts are payable at its counter, and credits receivable there. No transfer of stock can be completed unless shown upon the books of the bank. A list of the names and residence of all the stockholders must be there kept. The property, in its own nature, possesses much more of the immobility of real estate than any other personal property which we can now call to mind. The Legislature, then, did no violence to the nature of this property when it fixed the *situs* of the shares at the locality of the bank.

We have seen that the exercise of the power by the Legislature was both proper and legitimate. We have shown why it was proper and legitimate. It was necessary, because if this act had not been passed much of the bank stock in the State would have soon escaped taxation by modes so obvious as to need no specification. As it is, this is impossible. The assessor of each county knows every bank in the county, and has but to go to the books to ascer-

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First National Bank of Mendota v. Smith.

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tain the ownership of these shares. The act, instead of defeating uniformity and equality of taxation, which is the theory upon which its invalidity is asserted, does, in our judgment, tend to secure these results more effectually than any other method that could have been adopted.

This question has been before the highest courts of New York and New Jersey, and they have decided as we do. *National Bank v. Cook*, 3 Vroom, 347; *The People v. Commissioners of Taxes*, 35 N. Y. 423.

We know of no authority that can be cited in support of the ruling of the Circuit Court of the United States, for the Northern District of Illinois, to which we have already sufficiently adverted. The case just cited from 35th New York, in which this point was expressly ruled, was afterward carried to the Supreme Court of the United States; this point was not deemed of sufficient importance to be raised before that court; and the judgment of the Court of Appeals of New York was affirmed there without reference by the court to the question. 4 Wall. 244.

We cannot regard the attempt of the National banks to shield their stockholders from all State taxation as at all meritorious. They offer no grounds for the alleged exemption which we can regard as even plausible.

Although their franchises are conferred by act of Congress, still, all their business, so far as conducted with reference to profit, is done under our State laws, the same as corporations created by the laws of this State. It is by the laws of the State that their business transactions are governed, and by the same laws that their property is protected. So that they are under the same duty to contribute to the support of the State and municipal governments as any natural person or State corporation may be. Unless exempted by some plain rule of law, they should not ask a court of equity to relieve their stockholders from that duty.

*Decree affirmed.*



## MISSOURI RIVER TELEGRAPH COMPANY v. FIRST NATIONAL BANK OF SIOUX CITY.

(74 Illinois, 217.)

*Jurisdiction of actions against National banks to recover penalties.*

The courts of one State have no jurisdiction of an action against a National bank located in another State, to recover the penalty imposed by the act of Congress for the taking of unlawful interest.\*

*Semble*, That State courts have no jurisdiction of actions to recover penalties imposed by the National Banking Act.†

**A**CTION against the First National Bank of Sioux City to recover penalties alleged to have been incurred by it. Appeal from the Superior Court of Cook county.

*Bennett, Kratzinger & Veeder*, for appellant.

*Tenneys, Flower & Abercrombie*, for appellee.

Mr. Chief Justice WALKER delivered the opinion of the court.

It appears that appellee is a corporation organized under the Banking Law enacted by the Congress of the United States, and is located in the State of Iowa; and appellant, who sues for the use of Percy and Daggitt, is also a foreign corporation, organized and transacting business under the laws of Iowa. The first count of the declaration avers that appellee, in violation of the laws of Congress, received from appellant, interest over and above the rate allowed by the laws of Iowa, at divers times, the sum of five hundred dollars, whereby, under the act of Congress, appellee became, and was liable to pay to appellant double that sum, amounting to one thousand dollars. The common counts were also

\*See *Cook v. State National Bank*, *post*, wherein the Court of Appeals of New York held that the courts of that State had jurisdiction of an action against a National bank located in Boston. See, however, *Crocker v. The Marine National Bank*, *post*, wherein the Supreme Judicial Court of Massachusetts held otherwise. See, also, *Cadle v Tracy*, *ante*, p. 230; *Main v. Second National Bank*, *ante*, p. 200; and *Bank of Bethel v. Pahquioque Bank*, *ante*, p. 77.

†See *State v. Tuller*, *ante*, p. 375; *Newell v. National Bank*, *post*; and *Ordway v. Central National Bank*, *post*.

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added. To this declaration defendant filed a demurrer, which the court sustained, and rendered judgment for defendant, and this appeal is prosecuted.

It is urged in affirmance that the court below has no jurisdiction to try a cause of the character shown in the first count of the declaration; that it is for the recovery of a penalty imposed by the laws of another State, or of Congress, or both, and, inasmuch as courts never execute the criminal or penal laws of another State or government, that the rule would be violated to hold that this penal law may be executed by our courts. There can be no pretense that any law of this State has been violated, as it is averred that the transaction occurred beyond the limits of the jurisdiction of the courts in this State. And it is equally true that both the governments of the United States and Iowa are wholly independent of this State. They severally have all of the attributes of sovereignty essential to the enactment and enforcement of laws for the government of their citizens within the limits of their constitutions. And, in accordance with long-settled rules of law, this State cannot enforce their criminal or penal laws. See *Sherman v. Gasset*, 4 Gilm., 521. But the jurisdiction is claimed under the fifty-seventh section of the act of Congress to provide a National currency, etc. (13 Statutes at Large, p. 117), which provides that all suits, actions and proceedings arising under that act may be had in the United States courts or in "any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases." It is manifest that this language confers no jurisdiction on any court in this State to try this case, for the obvious reason that the appellant's bank or association is not located in this State. The jurisdiction attempted to be conferred is only in the State courts, the county courts or municipal courts in the State in which the bank is situated. By the plain meaning of the language of this section, Congress intended only to confer jurisdiction upon the State courts of Iowa, the county court of Woodbury county and the municipal court of Sioux City, if they had jurisdiction of similar cases under the laws of that State. The effort to confer jurisdiction was not on such courts generally, but simply upon the courts in the jurisdiction in which the delinquent bank might be located. The language is so plain that it will not admit of construction. The clear and unequivocal meaning of the law would be violated to hold other-

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wise, and it is manifest that the Superior Court does not answer to the description of any one of the courts enumerated by the act, and hence Congress neither intended to, nor did it confer jurisdiction in this case upon that court.

It is urged for reversal that our courts entertain jurisdiction in cases where these banks are parties either plaintiff or defendant, as we do with individuals, whether resident or non-resident. This is true, but the jurisdiction that our courts exercise in such cases results from the power conferred by our Constitution and laws, and not by any means from acts of Congress. All of their jurisdiction comes from that, and not from a foreign source. They are brought into being and exist alone by virtue of our organic law. And the same is true of the United States courts, as they derive all their powers from the Federal Constitution. We presume no one has ever conceived the novel idea that a State could, by legislative enactment, confer any power or jurisdiction on the Federal courts or officers. Nor can it be imagined that any one would suppose that if such an effort were made, and the Federal courts should refuse to exercise such jurisdiction, there is the least shadow of power by mandamus or otherwise to coerce obedience to the requirement of such a law.

If we could imagine that a law of that character could be passed, does any one believe that the Federal courts would thus acquire the semblance even of authority to act thereby? Does any one doubt that all acts under such an enactment would be void? Does any one suppose this State can rightfully confer judicial power on any other courts than those provided for and created under our fundamental law? Could our Legislature confer judicial power on the courts of other States? Surely not, and if the effort were made and the law were acted under, all their proceedings in pursuance of such a requirement would be clearly void.

The first section of article 4 of our Constitution provides that the judicial power of the State, except as otherwise therein provided, shall be vested in one Supreme Court, Circuit Courts, County Courts, justices of the peace, police magistrates, and in such courts as may be created by law in cities and incorporated towns. This section has exhausted the judicial power of the people of the State. It is there fully disposed of, leaving no residuum. There is nothing in that article that can be tortured into authority to confer any of the judicial power of the State on courts of other

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States, or the Federal courts, hence it would be palpably unconstitutional to enact such a law.

The first section, article 3, of the Federal Constitution, provides that : "The judicial power of the United States shall be vested in one Supreme Court, and such inferior courts as the Congress may from time to time ordain and establish." This provision has disposed of the judicial power, and it is vested in such Federal courts as have been ordained and established by Congress ; and under the express requirements of that section of the Federal Constitution it must remain there as now distributed until Congress shall see proper to organize other courts to which a portion of that judicial power may be distributed. In the face of this clear and unmistakable disposition of all the judicial power of the general government, can it be reasonably insisted that Congress may confer any of that power on courts they have not ordained or established ? And it will, we apprehend, be contended by no one that the Superior Court of Cook county was ordained or established by an act of Congress. Suppose the court below, on motion, had dismissed this suit, — to what Federal court or officer would counsel have applied to compel it to take jurisdiction and proceed to hear the cause. It seems to us to be impossible to imagine where such Federal power lies. If it exists it has, so far as we know, been unsuspected. The United States government, when created, was provided with all means necessary for the enactment of laws, their adjudication and enforcement, and it was supposed that the power would be exercised by its own agency, consisting of its own officers, created and maintained for that purpose, and that it would not require the officers of the State government to enforce its laws. See *Prigg v. Penn.*, 16 Pet. 539. That case holds that whilst State officers cannot be compelled to execute laws of Congress, although such laws may empower them to do so, still, when such officers so act they are fully justified and their acts will be valid and binding. This may be true, but that fact by no means compels State officers or tribunals to enforce the laws of Congress.

Our courts, under the powers conferred upon them by our Constitution, have jurisdiction over all persons and things within the borders of the State. And when persons or corporations, without reference to when or where the latter are created, come into this State, they are within the jurisdiction of our courts. And it is by virtue of this power thus conferred that our courts exercise their

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jurisdiction, and not by virtue of congressional action or Federal grant of power. If either of these corporations were to sue in our courts for any matters, except such as those to which the court would refuse to exercise its functions in favor of a natural person, our courts would take jurisdiction and proceed to trial and judgment. The law regards such bodies as persons, and extends to them the rights and privileges of natural persons but no more or greater rights. It then follows that the court below decided correctly in sustaining the demurrer to the special count of the declaration.

But it was manifest error to sustain the demurrer to the common counts. They are in the approved form. No objection to them has been suggested. It is true, that it is said that no account was filed under these counts. This court has held that such account is no part of the declaration and we can hardly see how it ever became necessary to make such a decision, as any one at all conversant with the elementary principles of pleading must see that it can form no part of the declaration.

We have examined the seventeenth section of the Practice Act (Laws 1871-2) and fail to see in what manner it has the slightest bearing on the question. It is true that it refers to attachment suits, and provides that in such cases the plaintiff may be required to file his declaration at the first term and the defendant have a trial at such term. How this can have the remotest connection with the question as to sustaining a demurrer to a common count in proper form is beyond our comprehension. We must conclude that there is a wrong reference as printed in appellee's brief.

For the error indicated in sustaining the demurrer to the common counts, the judgment must be reversed and the cause remanded.

*Judgment reversed.*

## WHEELLOCK v. KOST.

(77 Illinois, 296.)

*Shareholder in National bank, what constitutes—Estopped from questioning incorporation—Evidence of insolvency.*

Shares of stock in a National bank were issued to defendant as collateral security for money loaned the bank, and the dividends thereon were paid to him. Held, that defendant thereupon became a shareholder as to creditors and liable as such.\*

A stockholder in a *de facto* National bank, who has participated in its transactions as such and received dividends, is estopped from denying the legality of its incorporation.

A return of *nulla bona* made by a sheriff upon execution issued against a National bank is sufficient evidence of its insolvency.

THIS was a creditors' bill, filed by Elias Kost and others, creditors of the First National Bank of Decatur, against Otis L. Wheelock and others, stockholders of such bank. The opinion of the court states the material facts of the case. Otis L. Wheelock alone appealed from the decree below.

*Crea & Ewing*, for appellant.

*Park & Lee*, and *Nelson & Roby*, for appellees.

Mr. Justice SCOTT delivered the opinion of the court.

This bill was to compel parties, alleged to be stockholders in the First National Bank of Decatur, to pay certain judgments previously obtained against the bank. On the 16th day of February, 1870, the bank ceased to do a general banking business, and, it is alleged, it became insolvent. Executions, issued on the several judgments obtained by the creditors of the bank, were returned *nulla bona*.

Whether appellant was a stockholder in the bank at the date it ceased to do business and became insolvent, is a question that lies at the foundation of the relief sought, and must be first determined.

Briefly, the facts are : the appellant made some loans of money

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\* See *Hale v. Walker*, *post*; *Magruder v. Colston*, *post*.

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to the bank, and made and delivered to it his promissory note, partly as an accommodation, to be held among its other assets. It was agreed that fifty shares of stock in the bank, equal in value to \$5,000, should be issued to appellant, as collateral security for the loans of money so made, and as indemnity against liability on his promissory note held by the bank. That number of shares was in fact issued, and delivered to appellant, and certificates to that effect given, upon which he received, at different times, semi-annual dividends.

Whatever relation appellant may have sustained to the corporators of the bank, it seems clear that, as to its creditors, he occupied the position of a stockholder, and must bear all the burdens that relation imposed. The stock had in fact been transferred to him; it stood in his name as owner, and he availed of the dividends it earned. Having voluntarily assumed the relation of stockholder, it makes no difference he may have done it with a view to assist the bank in its credit or otherwise. The legal title to the stock was in appellant by his own procurement, although the equitable title may have been in other parties; but it would be a singular doctrine to hold that the creditor should seek out the equitable owner against whom to enforce his claim. Primarily, he may proceed against the party in whom is the legal title to the stock. Where shares of stock in a banking incorporation have been hypothecated, and placed in the name of the transferee, he will be subjected to all the liabilities of the ordinary owners. It is for the reason the property is in his name, and the legal ownership appears to be in him. *Morse on Banking*, 432; *Adderly v. Storm*, 6 Hill, 624; *In re Empire City Bank*, 18 N. Y. 199.

It being determined appellant is a stockholder, he cannot be permitted to urge, as defense, that the bank was not legally incorporated under the general banking laws. Having participated in the acts of user of a corporation *de facto*, a stockholder therein will, by such acts, be estopped to insist the corporation was not legal, when it is sought to enforce any liability he may have incurred. By the receipt of dividends on the shares of stock held by him, appellant participated in the transactions of the corporation. Whether the bank had been regularly organized, is not a defense that can be availed of by a stockholder as against a *bona fide* creditor, if it appears there was a corporation *de facto*, and that such stockholder was concerned in its transactions.

The allegation in the bill is, the bank was insolvent. Assuming it was obligatory upon complainants to make proof of this fact, no better evidence need be produced than a return of *nulla bona*, made by the sheriff upon the several executions issued against the property of the bank. This was done in this case, and it is sufficient to authorize proceedings by a creditor of the bank against an individual stockholder. Morse on Banks, 434.

Our conclusion being that appellant is liable as a stockholder in the bank, one other question remains to be considered, viz. : was the decree against him for too large a sum ?

It is alleged, the several parties made defendants each owned a certain number of shares in the bank, of the par value of \$100 each. The total number of shares, comprising the entire stock of the bank, is conceded to be one thousand. Of this number, it is charged appellant owned fifty shares. That is the number of shares hypothecated to him, and that stood in his name, as we have seen.

By the 12th section of the National Currency Act, the shareholders are "individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements, to the extent of their stock therein, at the par value thereof, in addition to the amount invested in such shares." Act of June 3, 1864.

The bill seems to have been dismissed as to the heirs of some of the deceased shareholders. The court found the number of shares held by the remaining defendants was nine hundred and sixty, which, added to the number owned by parties dismissed out of the case, makes a total of one thousand shares. As we understand the decree, the assessment was made upon the basis the entire stock of the bank consisted of one thousand shares. Appellant was treated as being the owner of fifty shares, in ascertaining the amount of the decree to be rendered against him. The mode adopted would only charge him with his just proportion of the debts of the bank, in proportion to the number of shares of stock standing in his name. It seems the mode adopted for making the assessments against the individual shareholders leaves out of view the fact that some of the share owners were insolvent, and other shares were owned by unknown heirs, against whom complainants did not choose to proceed.

Under the law, each individual shareholder is bound equally and ratably for the contracts, debts and engagements of the bank, in



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proportion to the par value of his stock, in addition to the amount invested in such shares, but no liability rests upon him for his fellow shareholders.

So far as the decree affects appellant, we do not understand it is different from what it would have been had the decree passed against all of the shareholders, whether solvent or not, and each adjudged to pay his ratable proportion.

The case of *Pollard v. Bailey*, 20 Wall. 520, is analogous to the one at bar, and is authority for the view of the law we have adopted.

No error appearing in the record, the decree of the Circuit Court will be affirmed.

*Decree affirmed.*

Mr. Chief Justice WALKER and Mr. Justice CRAIG : We are unable to concur in the decision reached in this case by the majority of the court.

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### NICKERSON V. KIMBALL.

(1 Chicago Law Journal, 42.)

*Taxation of National banks — Construction of statute — Equalization — Notice of complaint that bank shares were assessed too low — Deduction of real estate.*

The statute of Illinois provided that the stockholders in banks, whether State or National, should be assessed on the value of their shares in the county, town, district, village or city, where the bank was located, whether such stockholder resided there or not; but not at a greater rate than was assessed on other moneyed capital where such bank was located; that each bank should keep a list of the names, residences, and number of shares of each shareholder, which should be open to the inspection of the revenue officers; that the assessors should ascertain and report to the county clerk a correct list of the names and residences of all stockholders, with the number and assessed value of their shares; that the county clerk should enter the assessed valuation of such shares in the tax list, and compute and extend the taxes thereon; that such tax should be a lien on the shares and that the bank officers should retain the dividends on such stock until the tax was paid. *Held* constitutional.

Under the statutes of Illinois any one may complain to the board of equalization, that another is assessed too low, but such complaint is not to be acted upon until the person so assessed or his agent has been notified of such

complaint, if a resident of the county ; and no error or formality in the proceedings of any of the officers connected with the assessment, levying or collecting of the taxes, not affecting the substantial justice of the tax itself, shall vitiate, or in any manner affect, the tax or the assessment thereof. *Held*, (1) that notice of the complaint to the person assessed was not essential to give the board jurisdiction ; (2) that the bank was the agent of the shareholders, and service of notice on the officers of the bank was sufficient ; (3) that the complaint need not specify each person claimed to be assessed too low, but a description of them as "shareholders in" a particular bank was sufficient.

A National bank alleged that it had been assessed on both its shares of stock and its real estate, and that the value of the real estate was not deducted from the gross value of the stock. It appeared that the aggregate assessed valuation of both the stock and the real estate was less than half their real value. *Held*, that the bank had no cause to complain.

**B**ILL in chancery for an injunction to restrain the collection of a tax assessed on shares in National banks, on the ground that such assessment had been unlawfully increased by the board of equalization.

*Charles Hitchcock, Wirt Dexter, Sidney Smith, Melvin W. Fuller and George W. Kretzmeyer, for plaintiffs.*

*Elliott Anthony and John M. Roundtree, for defendants.*

Mr. Justice MOORE delivered the opinion of the court, May 9, 1877.

The Constitution of the State provides for raising revenue by levying taxes, by or according to "valuation" of the property to be taxed ; every one shall be taxed and pay in proportion to the value of his property. This rule is extended to persons and corporations owning or using franchises and privileges. Taxes must be "uniform" in respect to persons and property ; every law that imposes a tax must regard every man alike. *Vide* Constitution, art. 9, §§ 1, 9, 10 ; Hurd's Rev. Stat., pp. 74, 75.

The law must not discriminate for or against any one. It must be uniform. The law enacted under the Constitution must be enforced by men who may err in judgment, and therefore burdens may fall unequally. This will result from the different views that different men may take of values and the like, and does not show that the law imposing a tax is wanting in the principle of uniformity. This principle of uniformity must extend to every person and to every corporation.

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“Personal property . . . shall be valued at its fair cash value,” Chap. 120, § 3, Hurd’s Rev. Stat., p. 857.

“*The stockholders* in every bank located within this State, whether such bank has been organized under the banking laws of this State, or of the United States, shall be assessed and taxed on the value of their shares of stock therein, in the county, town, district, village or city where such bank is located, and not elsewhere, whether such stockholders reside in such place or not. . . . Taxation of such shares shall not be at a greater rate than is assessed upon any other moneyed capital . . . where such bank is located.” In each of said banks there shall be a list of the names and residences of its stockholders, and of the number of shares held by each. This list shall be open to the inspection of the revenue officers, “and it shall be the duty of the assessor to ascertain and report to the county clerk a correct list of the names and residences of all stockholders in any such bank, with the number and assessed value of all such shares held by such stockholder.” § 36.

“The county clerk . . . shall enter the valuation of such shares in the tax list in the names of the respective owners of the same, and shall compute and extend taxes thereon the same as against the valuation of other property in the same locality.” § 37.

‘This tax is declared to be a lien upon the respective shares of stock. § 38.

It is made the duty of the bank or its officers to retain the dividends belonging to the respective stockholders until the tax shall have been paid. Any officer violating this provision of the law shall thereby become liable for such tax. The collector may sell the shares of stock when the owner refuses to pay the tax. Chap. 120 §§ 35, 36, 37, 38, 39, Rev. Stat., p. 864.

There can be no question but that these provisions of the law are in harmony with the Constitution. The “valuation” is required, as is “uniformity,” and all as provided by the Constitution. The law makes the same provision in valuation to every one who may own the stock of the various banks in the State. If the tax imposed by this law operates unequally, it must be because the law itself is not complied with.

It was seen that the assessor must be a man, and so might fail in discharging his duty. Hence the county board, acting as a board of equalization, may review and correct what has not been done correctly. “On the application of any person considering

himself aggrieved, or who shall complain that the property of another is assessed too low, they shall review the assessment and correct the same as shall appear to be just." That is to say, if any one thinks his property has been valued too high and so considers himself "aggrieved," he may complain, and if the board regard his complaint as well founded, then they will review and correct the assessment, by reducing the valuation; or it may be some one thinks that burdens are not equal, and so "complains that the property of another is assessed too low." It is then the duty of the board to review and correct the assessment as shall appear to be just. If the complaint is well founded, as in the former case, the assessment can be corrected only by increasing the "valuation." However, it is provided that "no complaint that another is assessed too low shall be acted upon until the person so assessed, or his agent, shall be notified of such complaint, if a resident of the county." Chap. 120, § 97, sub-sec. 2, Rev. Stat., p. 873.

One other provision of the statute has been referred to in considering these cases. That provision, it is claimed, modifies the other provisions referred to materially, modifies many decisions of the Supreme Court. It is provided (*inter alia*) that "no error or informality in the proceedings of any of the officers connected with the assessment, levying or collecting of the taxes, not affecting the substantial justice of the tax itself, shall vitiate or in any manner affect the tax or the assessment thereof." Chap. 120, § 191, Rev. Stat., p. 890. True it is, this provision is found in the middle of a section that is providing for the proper mode of rendering judgment on the delinquent tax lists; but yet there is no language or words used in any other part of the section that changes, or modifies, or limits the meaning of the provision enacted. The words would mean the same, neither more nor less, if they stood alone in a separate section, or in any other connection.

The provisions under consideration, when brought together, then may be read in this way: "Any one may complain that another is assessed to low, but such complaint shall not be acted upon until the person so assessed, or his agent, shall be notified of such complaint, if a resident of the county; and no error or informality in the proceedings of any of the officers connected with the assessment, levying or collecting of the taxes, not affecting the substantial justice of the tax itself, shall vitiate or in any manner affect the tax or the assessment thereof."

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Nickerson *et al.* aver that they are shareholders of the stock of the First National Bank of Chicago. Barton *et al.* are shareholders of the stock of the Fifth National Bank of Chicago. Coolbaugh *et al.* are like shareholders of the stock of the Union National Bank of Chicago. Blair *et al.* are shareholders of the stock of the Merchants' National Bank of Chicago. Fairbank *et al.* are shareholders of the stock of the Commercial National Bank of Chicago; and Sturges *et al.* are the shareholders of the stock of the Northwestern National Bank of Chicago. The respective complainants make substantially the same averments. The complainants are all residents of the county of Cook, and the respective banks are located in Chicago.

In addition to other averments which are necessary to give jurisdiction, it is averred that the shares of stock of each bank were "assessed and taxed on the value of the shares;" that the assessor of the town of South Chicago, as such assessor, listed the shares of the capital stock of the respective banks for taxation, he giving the valuation thereof as fixed by himself; that this assessment so made by him was returned to the county clerk; that then it was the duty of the clerk to enter the valuation of the shares, as made by the assessor, in the tax lists, in the names of the respective owners, and compute and extend the tax therein on the valuation so made; that these things are required by the provisions of the statutes hereinbefore quoted; "that the assessor, in making the assessment for the year 1876, listed all bank shares and like property at one-third of the value which, in his judgment, said shares were actually worth."

To this point no question is raised, but that the law has been complied with. But complaint was made by persons stating that they considered themselves aggrieved, and complained that the personal property of the following named persons, firms and corporations have been assessed too low for the year 1876, to-wit: *shareholders* "of the stock of the respective banks, and designating the name of the bank. This complaint was addressed to the board of commissioners of Cook county, and those complaining asked the board to review the assessments for 1876 of said persons, firms and corporations, and correct the same as shall appear to be just." This was the only complaint that was filed, and the only notice of this complaint was given to the presidents or cashiers of the banks.

The board did review the assessments, and corrected them by increasing the valuation very considerably; but in no case did the valuation or assessment thus increased amount to more than one-third of what appears to be a fair cash market value of the respective shares of stock. It is admitted that the stock is personal property, and it is not claimed by any complainant that the shares, by either the assessor or board, were "valued at their fair cash value."

The complainants aver that the county board had no jurisdiction of the matter, or, rather, of the persons of the complainants, until the complainants or their respective agents had notice of such complaint; and they claim that neither the bank nor any officer of the bank was agent of the shareholders.

A number of authorities are referred to by the learned counsel to show that the question of notice is *jurisdictional*. It is perhaps by some of the counsel conceded that the county board had jurisdiction of the subject-matter, and it is claimed that the said board could have jurisdiction of the persons residing in Cook county only when they have notice. This notice is not required as to any one residing beyond the limits of Cook county. If the complainants be correct, then the fact that notice to non-residents is not required must operate as a hardship. It is not protecting all alike. It must be borne in mind that the valuation or assessment made and returned by the assessor is made by procuring the necessary information from the bank. The officer calls at the bank and makes his list, and then the valuation is made and returned. Of this fact and of the additional fact that dividends must be retained by the bank until the tax is paid, every person must take notice. This assessment and this return, it may be said, is the matter that, in the first place, confers jurisdiction or sets in motion the officers and those having jurisdiction. It has been held in our own State, "that where the board of supervisors exercise the power to revise the assessment of an individual, he must have notice, and an opportunity to be heard, before it can be legally done." *Cleghorn v. Posthwaite*, 43 Ill. 428; *Darling v. Gunn*, 50 id. 424; *First National Bank of Shawneetown v. Cook et al.*, 77 id. 622.

This last-named decision was made under the law as it existed March 7, 1873. The provision of the law that is supposed to modify the law as it then existed took effect July 1, 1873, and provides that no error or informality not affecting the substantial justice of the tax itself shall vitiate or affect the tax on the assessment thereof.

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In the case of *Darling v. Gunn*, 50 Ill. 459, the court holds : "The tax, to the extent it was increased, . . . having been levied on an unauthorized assessment, made by persons having no jurisdiction of the person to make the assessment, without notice to the appellant, its collection should have been enjoined."

This case falls within the former decisions of the court, in which it is held that a court will not interfere to restrain the collection of a tax unless it is levied by persons having no authority. As the law then stood, it was incumbent on the court to find that error existed; but it was not necessary to find more than that error existed. That was all that was required. It was not necessary to pass upon the jurisdictional question. As the law now stands, this inquiry is necessary, since the court will not enjoin the collection of a tax for *mere* error or informality. It cannot be that the various officers must give notice to every one specially concerned before they can act in relation to the assessment of taxes.

In the case of the *National Bank of Shawneetown v. Cook*, 77 Ill. 622, the assessment had been made and corrected by the State board of equalization, and then, without notice, the valuation was increased; and the court holds : "that it is a proposition upon which there can be no doubt that the board *had no power* to make any change in the assessment without notice to appellant." By this language the court is understood as holding no more than that it was simply error in the board to exercise the power without special notice to be affected thereby. That was the direction of the statute, and it is still the direction of the statute, and to disregard it is an error.

In the case of *Mix v. People*, 72 Ill. 241, it was held that the levy must be made within the time prescribed by law, or it would be void. Was it necessary for the court to hold language so strong ? Was it intended to decide any thing more than that, as the law then existed, it was such an error as vitiated the levy of the tax ? The Supreme Court afterward said : "It is also urged that the local taxes were not levied and returned to the clerk in time ; and in support of the position, the case of *Mix v. The People*, *supra*, is referred to as controlling this. That tax was levied under the law of 1872, whilst this is under the statute of 1873, which amends the prior law. See § 191, p. 890, Rev. Stat. 1874. That section declares that no error or informality in the proceedings of any of the officers connected with the assessment, levying or collecting of

the taxes, not affecting the substantial justice of the tax itself, shall vitiate or in any manner affect the tax or the assessment thereof. This provision most effectually disposes of this question." *Buck v. The People*, 78 Ill. 560.

Then again it is held by the Supreme Court: "It is urged that the certificates of the levy of the local municipal taxes were not filed in the time required by the statute. The answer to this is, as was said in *Buck v. The People*, *supra*, that 'it is cured by the 191st section of the Revenue Law.' This cures all defects growing out of the failure to file the certificate on or before the day named in the 122d section." *Chiniquy v. The People*, 78 Ill. 570.

In the section 122 referred to in the last-cited case, the provision is positive, and appears to be mandatory: "The authorities.... collecting taxes....*shall* annually, on or before the second Tuesday in August, certify," etc. § 122, Rev. Stat. 878. This language is not less peremptory than the language used in § 97, Rev. Stat. 873: "No complaint that another has been assessed too low shall be acted upon until the person so assessed or his agent shall be notified of such complaint, if a resident of the county; and yet it is held that since the adoption of § 191, Rev. Stat., the fact that the certificate is not filed in apt time is not such an error as will vitiate either the tax or the assessment. The amendment introduced into the 191st section of the present Revenue Law has produced a radical change in proceedings to recover judgment for delinquent taxes, and has overruled or modified most, if not all, of our previous decisions on the questions thus arising." *Vide Chiniquy v. The People*, *supra*.

It will be borne in mind that in all these cases the people were seeking judgments, and must show jurisdiction.

In the cases now under consideration, those denying the jurisdiction are the complainants. They must make out their respective cases. The people in the cases cited must show that all the officers have complied substantially with the law, or they fail. In these cases now being considered, the complainants take upon themselves to show that the county board had not jurisdiction of the persons of the complainants; and this they must do by overcoming the presumption that a lawful tribunal, in the exercise of its duties, confines itself to whatever authority has been conferred upon it. This is especially true when it is conceded that the tribunal has jurisdiction of the subject-matter of the controversy.



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Can it be questioned that the law might provide for the assessment, and review of the assessment, without notice to any one? But courts cannot render a judgment until there is a service of process, either actual or constructive. A judgment without service of some kind would be void and nugatory in every land. And yet, such a rule will not be applied to any tax or revenue matter.

The fact that a man must be taxed on all that he has and that he must be so taxed every year is known to and by every one. The assessor is directed to call on him or on his agent and assess his property. He knows that must be reported, and he should take some notice of what is done in the premises thereafter. There is recognized no provision of section 97 that fails to require notice to the shareholder of stock not residing in Cook county. As opposed to this view the learned counsel refers to a New York case. School trustees levied a tax for school purposes. In making up the assessment roll the valuation of plaintiff's property was increased from the valuation thereof upon the town assessment roll. Before making the roll the trustees gave no notice. This assessment is an *original* assessment, made without any call upon the tax payer; so that it might well be said there is no jurisdiction of his person until he has notice. In that case the learned chief justice reviews the authorities, and says, "the authorities are not entirely in harmony, and the precise question has not been passed upon by this court." The opinion concludes, "that the weight of authority is that the omission to give the notice is a jurisdictional defect." *Vide Jewell v. Van Steenburgh*, 58 N. Y. 85. These school trustees were allowed to take the assessment roll of the town assessors, and upon proper notice make such changes as to them might seem right; and then for school purposes the trustees could levy their tax. This was as truly an original assessment as that made by the town assessor. There was no original call so as to confer the jurisdiction. It is not clear that this authority is opposed to the suggestions herein made.

A well-considered New Hampshire case is referred to, and judgments that are void or only voidable are carefully discussed.

It is found by the court that tribunals which have jurisdiction of the subject-matter are not absolutely void by reason of any irregularity or illegality of the proceedings in general, but they are avoidable by proper and timely objections. *The State v. Richmond*, 26 N. H. 232.

If it still be claimed that there was no jurisdiction of the persons of the complainants until they respectively, or their agents, had notice, and that the county board could not review the assessment until such notice had been given, then it becomes an important inquiry how and to whom may such notice be given? There can be no question but that if knowledge was brought home to any of the complainants, such as had the knowledge must be regarded as having had notice. "Actual notice exists where knowledge is actually brought home to the party to be affected by it." Bouvier's Law Dictionary. It will be readily conceded that notice to an agent is notice to the principal. If doubted at all it must still be true in the case under consideration, since the statute requires notice to the party *or his agent*. Then, if knowledge is actually brought home to the agent of the complainants they must be regarded as having notice, even if they had, in point of fact, no knowledge that the complaint had been made to the county board that their shares of stock had been assessed too low. It is claimed by one of the counsel that notice to one of his clients, as president of the bank, was not notice to him personally. If knowledge of a fact be notice, and sometimes more than mere notice, then this position cannot be maintained. The statute does not say what kind of notice must be given. It simply requires notice. If any officer of a bank have knowledge that the complaint has been made, and he be the owner of any of the shares of stock, he cannot be allowed to say that he individually has no notice. He has more than mere notice. He has actual, positive knowledge that the complaint is made. In this view there can be no question.

In addition to such actual knowledge, it appears that some of the officers, who are complainants, actually appeared before the county board and opposed the complaint. A party appearing in a suit, with or without service, cannot afterward deny that he is properly before the court. A party appears and cross-examines a witness when giving a deposition; he cannot afterward say he did not have notice of the time and place of taking the deposition. These are familiar principles, admitted by all, and show conclusively that such as appeared before the county board, and resisted the review and correction of the assessment, will not be allowed to deny that they had notice of the complaint. What is notice to those who had no such knowledge? What is notice to such as did not appear and oppose the correction?

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The notice required is not, in every particular, like unto the process to be served on a party to bring him before the court. Original process cannot, as a general thing, be served on an agent. In this matter it is only necessary that the agent be notified. The Revenue Law deals with shares of stock and taxes them as the personal property of each shareholder, and such a tax is not a tax on the capital or property of the bank. *State Farmers' National Bank v. Cook*, 32 N. J. 349; *Van Allen v. Assessors*, 3 Wall. 573 (*ante*, p. 1).

The case of *Farmers' Bank v. Cook*, *supra*, does not pass upon the question of service of notice otherwise than as by way of argument. Counsel refers to the case of *State v. Drake*, 33 N. J. 194. In that case it is correctly held that a notice under the tax law, served upon the tenant of the one complaining of the tax, is not a sufficient service. There is no reason in concluding that a man's tenant is his agent. It would be more reasonable to select a man's regular attorney or solicitor, and yet it will hardly be contended that such notice might be served on such attorney or solicitor. It is held that a notice to a bank cannot be served on a director having no share in the management of the matter about which the notice is given. The directors or trustees, when assembled for the transaction of business, are the agents of the corporation, and notice to them, when thus assembled, is notice to the corporation and binding upon their successors. But notice to an individual director, who has no duty to perform in relation to the subject-matter of the notice, is not a notice to the corporation. *Powles, etc. v. Page*, 3 Mann. G. & S. 16; *The Fulton Bank v. The New York & Sharon Canal Co. et al.*, 4 Paige, 127.

This general doctrine will not be questioned, and yet in our State the statute provides that a process against a corporation may be served upon a "clerk," "cashier," "director," etc., if the president shall not be found in the county.

Again, it is held, and is certainly a fundamental principle, that notice served on the agent, in order that it may bind the principal, must be served whilst the agent is acting within the scope of his agency. *Miller v. Illinois Central Railroad Co.*, 24 Barb. 312; *Loomis v. Bank of Rochester*, 1 Disney, 285.

In this connection, whilst laying down general principles, it will be seen that the provision is not that notice shall be given to the principal, and may be given by delivering a copy of a notice to an

agent of such principal. The language of the statute is, "no complaint . . . shall be acted upon until the person assessed, or *his agent*, shall be notified." That is to say, the principal may be notified, or, if more convenient, the agent only may be notified.

It is claimed that the bank is the agent of the shareholders of the stock. It is the duty of the corporation, by its officers, to so direct and manage its affairs as to preserve and promote the highest interest of those interested therein. It is true the officers act directly for the bank, but the bank is an artificial person and can have no interest to preserve or promote, save and only the rights and interests of the shareholders. None others can have an interest in the management. The bank owns the property, the land, the money, all the assets, the privileges and franchises; but the officers are elected by the shareholders of the stock, and they are selected for the purpose of managing well the property of the bank. The shareholders measure the value of their shares of stock by the value of the property and franchises belonging to the bank. If these be under unskillful or improvident management, the amount of dividends and the value of the shares of stock are diminished. If the shares are valued and assessed at a high rate by the assessor, their productive resources are diminished to that extent. There can be no person so well qualified to determine the real productive and market value of shares of stock as the officers who manage and control the bank for the interest and benefit of the shareholders. "When shares of capital stock have any value as an article of sale, it is because the purchaser supposes that the tangible and intangible property and the franchises are sufficient, if the affairs of the company were wound up, to pay all the debts and pay a surplus in distribution to the shareholders equal to the per cent the purchaser gives." *Ottawa Glass Co. v. McCaleb*, 81 Ill. 556; *Porter et al. v. Rockford, Rock Island & St. Louis Railroad Co.*, 76 id. 561.

It is self-evident that the value of an article of sale must depend largely upon the skill put forth in the management by the officers. It will be conceded that there is none so suitable to look after all matters pertaining to the assessment and taxing the shares of stock as the officers of the bank.

By the statute it is required that the bank shall keep the list of the names of the stockholders and of the number of shares held by each, and this list is for the inspection of the officers authorized to

assess property for taxation. From the bank the officer obtains the information that enables him to make and return a list to the clerk.

“For the purpose of collecting the taxes it shall be the duty of every such bank, or the managing officer or officers thereof, to retain so much of any dividend belonging to the stockholders as shall be necessary to pay any taxes levied upon the shares, until it shall appear that such taxes have been paid.” §§ 36, 37, 39, Revenue Law, Rev. Stat. 864.

It is the bank that gives the information to the officer and enables him to value the shares. It is the bank that is required to retain the dividend until the tax is paid, and it is the officer of the bank who is made liable if the dividend is not so retained. It is thus made quite clear that the statute makes the bank the agent of the stockholder for some purposes connected with the taxation of the shares of stock. In the case of *The Ottawa Glass Co. v. McCaleb*, *supra*, it is stated that “a corporation acts as quasi trustees in managing the business of the shareholders, and it is competent to the General Assembly to require the whole taxes to be paid by the corporation, which corporation may then require repayment of the tax on shares to be refunded by the shareholders, either by deducting the amount from dividends or otherwise.”

It has been held by the Supreme Court of the United States, and by the courts of New York, New Jersey and of this State, that under the provisions of the act of Congress, the right of the States to tax all shares in the stock of the National banks clearly exists. *First National Bank of Mendota v. Smith*, 65 Ill. 44, and the various authorities there cited.

It has been held in the same case (*supra*) that the bank is the trustee of the stockholders (p. 54), “and as such possesses the lawful control over the rights and interests of the *cestuis que trust*, much greater than that of a *mere agent* for the loan of money.

“Certificates of stock are not securities for money, in any sense, much less are they negotiable securities. They are simply the muni- cements and evidence of the holder’s title to a given share in the property and franchises of the corporation of which he is a member.” *Mechanics’ Bank v. New York Railroad Co.*, 3 Kern. 627; *First National Bank of Mendota v. Smith*, 65 Ill. 44.

The banking corporation has a fixed locality where it must transact its business, and there wind up its affairs when it ceases to

exist. It is the trustee of the stockholders who must come to its counter for their annual dividends, and their share of assets on final liquidation. 65 Ill. 56, *supra*.

It is thus seen that the stockholder has a title to a share in the property and franchises of the bank, that he is one of the owners of the bank, that this property and the franchises are managed and controlled by officers selected by the stockholders, that it is managed for the stockholders, that the bank is the trustee of the stockholders, that it is peculiarly and especially the duty of the bank to do and manage every thing so as to make the shares of stock valuable, and so as to make them yield a dividend, and to guard against every thing that may diminish the amount of dividends. The conclusion is inevitable that the bank must be the agent of the shareholder; it was only necessary to give notice to the bank. It has been seen that even original process could be served on the bank by serving on the president, cashier or director. Some of these notices were served on the president and others on the cashier. There was then sufficient notice to give jurisdiction of the persons of the shareholders. Was there a sufficient complaint? is the next question requiring attention.

The provision of the statute is, a citizen may "complain that the property of another is assessed too low." It is not stated what averments the complaint shall contain, nor is it stated whether the complaint shall be oral or written. The complaints in these cases contain nothing more than that they complain that the personal property of the shareholders of the several banks (naming them) has been assessed too low. It is objected that this is too uncertain; that no person is named, and no traversable fact is complained of and that it is vague and general.

"To complain of an assessment set opposite to each name on the assessment list, and to ask that evidence may be heard in each and every case and every name on the assessment list, or to the value of the property therein assessed, and to change the value as may seem just, and that the valuation may be reduced or raised as may seem just and equitable," has been held to be too general and too vague and uncertain. "Such complaint states no fact and is nugatory." There should be something complained of, and the party appearing should be informed of the matters which he may be required to meet. *People v. Reynolds*, 28 Cal. 111, and *People v. Flint*, 39 id. 673.

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The California statute may not be like our statute in every particular, but no reason is seen why the Illinois courts should hold differently from the authorities cited.

In the complaint held to be nugatory there was no complaint of any valuation, or of any parcel of property or to any species of property. It was not complained that the valuation was too high or too low. No person or class of persons is described in the complaint. In these cases under consideration no one person, but a class of persons, is named ; no one article of property is described. The averment is, the shares of stock of the shareholders of the particular bank is valued too low. The complaint and notice might have named each particular shareholder, and they might have designated the number of shares owned by each shareholder. But why? The shareholders, if named each by himself, and if told the precise number of shares owned by each, would not be the wiser for the information. The description, "shareholders in a particular bank," though not the names of persons, is so definite and certain, that no other persons can be mistaken for them. There can be no question as to who is meant. It is the stock, it is the shares of stock, that is described as assessed "too low." This can be easily understood. This would be the case even though there was nothing else in the record. But all these shares of stock had been regularly assessed to each respective owner thereof, so that the complaint and notice meant that the shares of stock belonging to each of the respective shareholders had been valued "too low." The notice and complaint must be held sufficient.

Finding the notice and complaint sufficient, it remains to inquire what wrong or what injustice has been or is about to be done to either of the complainants?

It has frequently been held that a court of equity will not entertain a bill to restrain the collection of taxes, except in cases where it has been assessed upon property not subject to taxation, or where the tax is unauthorized by law, or where the property has been fraudulently assessed, at too high a rate. This doctrine has been announced so frequently, in so many cases and under such varied circumstances, and under such varied forms of expression, that it cannot be necessary to cite authority. But, for fear that a different doctrine might be insisted upon, the General Assembly has enacted section 191 of Revenue Law. And now "No error or informality in the proceedings of any of the officers connected with the assessment,

levying or collecting of the taxes, not affecting the *substantial justice of the tax* itself, shall vitiate or in any manner affect the tax or the assessment thereof." In none of these bills is it claimed that any injustice has been done. The property is clearly subject to taxation. The tax is unquestionably authorized by law. It is not in any one of the bills claimed that the property has been assessed at too high a rate. It is not shown or claimed that any thing has been done that affects the substantial justice of the tax itself. It is simply averred that the assessment made and returned by the assessor was increased, and that it should not have been so increased. It is not claimed that the present valuation amounts to more than one-third the actual cash market value of the stock. There is but one exception to this statement. The shareholders of the Union National Bank state that the bank has been taxed on its real estate, and that when the shares of stock were assessed the value of the real estate should have been deducted from the gross value of the stock. They claim that this deduction was made in the assessment of the stock of all the other banks where they owned real estate. But, unfortunately for the shareholders of the Union National Bank, they fail to show that any injustice is done.

If the value of the real estate be added to the assessed value of the stock, the aggregate value falls considerably below one-half the actual cash value of the stock. They simply show that others are assessed entirely too low, whilst they are not yet assessed as high as they should be. The propriety of assessing any property below its actual cash value may well be questioned, if not designated as pernicious. If all the property in the county and State was assessed at its actual value, the grand total would be increased so much that the actual wealth and resources of the State would be known and would amount to such an enormous increase over the present assessments that the rate per cent of taxation might be much reduced.

The statute provides that personal property shall be valued at its fair cash value, and yet if this cash value is imposed in only one county or town, it would be oppressive to the people of such county or town. The rule, to be of advantage, should extend throughout the State.

In no one of these cases has it been shown that the property is made to bear more than its just burden of taxation, nor have the owners been debarred of any substantial rights secured by the law



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of the land. The tax on the property is just, and no void reason is made to appear why the owners should not pay it. A careful examination of the cases presented for the consideration of the court fails to show any thing that affects the substantial justice of the tax itself, and until this is shown the court cannot grant the relief sought.

"The statutes unmistakably show that it was the legislative will that mere technical objections not affecting the justice of the tax itself should not be regarded." *Beers et al. v. The People*, 9 Leg. News, 176; *Buck v. The People*, 78 Ill. 566; *Chiniquy v. The People*, id. 572; *Purrrington v. The People*, 79 id. 11.

The law imposing the taxes is in all its parts "uniform." It provides for the constitutional "valuation," and does not go counter to the law of Congress.

The complainants fail to show that any act of injustice is about to be done to them. They do not show any thing that affects the substantial justice of the tax they seek to enjoin.

The injunction asked for in each case is denied.

*Injunction denied.*

## BOARD OF COMMISSIONERS OF MONTGOMERY COUNTY v. ELSTON.

(32 Indiana, 27.)

*Taxation of National currency.*

The circulating notes of National banks, known as "National currency," are not exempt from taxation by a State.

THIS was a complaint by the appellee against the board of commissioners and treasurer of Montgomery county, to restrain a sale of certain personal property, levied upon by the said treasurer by virtue of a warrant to collect the sum of \$418.49, being the amount of tax and penalty on \$27,175 in the hands of the appellee on the 1st day of January, 1868.

One-half of this sum was in treasury notes of the United States, known as "greenbacks;" the remaining portion was in the notes of National banks, designated as "National currency." This sum had been returned for taxation under protest.

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A demurrer was overruled to this complaint, and a perpetual injunction was granted.

*R. H. Galloway* and *P. S. Kennedy*, for appellants.

*S. C. & L. B. Willson* and *J. M. Butler*, for appellee.

RAY, J. [After stating facts and deciding, in accordance with *Bank v. Supervisors*, 7 Wall. 26, that the United States treasury notes were not liable to taxation, continued]:

There remain but two questions. Has Congress attempted to extend this exemption from State taxation to the currency issued by the National banks? If she has declared this exemption, was the subject within her jurisdiction?

The act of February, 1862, declares that "all stocks, bonds and other securities of United States held by individuals, corporations or associations, within the United States, shall be exempt from taxation by or under State authority." 12 Stat. at Large, 346, § 2.

And this provision is re-enacted, in application to the second issue of United States notes, by the act of July 11, 1863. 12 Stat. at Large, 546.

And, as if to remove every possible doubt from the intention of Congress, so far as treasury notes were involved (the National bank notes not then being issued), the act of March 3, 1863 (12 Stat. at Large, 709), which provides for a further issue of treasury notes, omits in its exemption clause the word "stocks," and substitutes for "other securities" the words "treasury notes or United States notes issued under the provisions of this act." The act authorizing the issue of National bank notes was approved June 3, 1864, and the 22d section provides that the notes shall express upon their face the promise of the association receiving the same to pay on demand, and that they are secured by the deposit of United States bonds with the Treasurer of the United States: But these bonds are not the property of the United States, but of the National bank issuing the notes. It is true, that the government in the act agrees to redeem the notes on failure of the bank, but the primary liability rests upon, and promise to pay comes from, the National bank; and before the government does so redeem, she declares forfeit to herself all bonds deposited as security for the issue, these bonds

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being in excess of the aggregate of notes, and the bonds her own promise. Thus, in fact, in payment of the notes, by her, she simply pays her own bonds at less than their face, and may cancel an amount of said bonds at their current rate, not to exceed par, equal to the currency redeemed, and shall hold a first and permanent lien for any deficiency in the proceeds of the bonds, if sold, on the assets of the bank. There is no clause in this act exempting the notes from State taxation, but an express provision making its shares liable.

It is insisted, however, that the act approved June 30, 1864, entitled "An act to provide ways and means for the support of the government, and for other purposes" (13 Stat. at Large, 218), exempts this issue of the "National currency," as it is entitled. The first section of that act declares that "all bonds, treasury notes and other obligations of the United States shall be exempt from taxation by or under State or municipal authority."

The last section is as follows:

"SEC. 13. *And be it further enacted*, that the words 'obligation or other security of the United States,' used in this act, shall be held to include and mean all bonds, coupons, National currency, United States notes, treasury notes, fractional notes, checks for money of authorized officers of the United States, certificates of indebtedness, certificates of deposit, stamps, and other representatives of value of whatever denomination, which have been or may be issued under any act of Congress."

This, at a first glance, might seem to bring "National currency" within the exemption, and, as we are not indebted to counsel for a solution of the difficulty, doubtless has misled them in the argument. But the words in quotation in the thirteenth section are technical, and are not the identical words used in the same order in the first section, and, therefore, the reference to that section would be more than questionable. All doubt, however, is removed by the use of the same technical phrase, in the eleventh section of the same act, in which it is provided, "that if any person having control, custody or possession of any plate or plates from which any *obligation or other security*, or any part thereof, shall have been printed," etc., "or shall have or retain in his custody or possession, after a distinctive paper shall have been adopted by the Secretary of the Treasury for *obligations and other securities of the United States*, any similar paper adapted to the making of any such obligations or other security," etc., "every person so offending shall be deemed

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guilty of a felony, and shall, on conviction thereof, be punished," etc.

It thus appears plain that the entire intent and purpose of the last section of the act was to throw around "National currency" the same guards against counterfeiting that were by law provided for "obligations and other securities of the United States."

Clearly, no exemption in any act prior to the authority given to issue "National currency" can apply, and as they are not obligations of the United States, in any proper sense of that expression, as they do not rest primarily on the promise of the government to pay them as her own debt, but simply on her promise that she will amply indemnify herself in her own bonds, and only after failure of the bank and forfeiture of the bonds to her will she regard herself as finally liable; certainly, there is nothing in the letter of the law exempting this circulation from taxation; and though we do not discuss the power of Congress to make such exemption, we are free to admit that we see nothing in the paper itself or the circumstances of its issue which would authorize such a limit to be placed on the power of the State to tax.

It follows, that the amount of the assessment on the moiety consisting of treasury notes was unauthorized and illegal; and that the amount rated upon that portion consisting of currency of the National banks was legal and proper.

Under a rule often expressed in this court, the appellee, not having tendered to the treasurer of the county the amount legally due, cannot successfully invoke the aid of the court by the interposition of its extraordinary remedy of injunction to prevent the collection of a tax in part legal and in part illegally assessed.

Judgment reversed, and cause remanded, with direction to sustain a demurrer to the complaint for injunction.

## WHITNEY ET AL., appellants, v. RAGSDALE, Treasurer.

(33 Indiana, 107.)

*Taxation of National banks — Constitutional law — Place of taxation.*

By an act of the Indiana Legislature passed in March, 1867, shares of the capital stock of National banks within the State were taxed for that year, and the cashier of each bank was required to represent each stockholder in listing and valuing his stock. *Held*, that the statute took effect from the 1st day of January, 1867, that it was a valid exercise of the taxing power, and that it did not conflict with the constitutional requirement of "a uniform and equal rate of assessment and taxation."

The requirement of such act, that the stock shall be taxed at the place where the bank is located, is not invalid where the owner of the stock lives in another county or State.

**I**NJUNCTION to restrain the collection of a tax. The appellants filed their complaint in the court below, against the appellee, on the 29th of July, 1868. It alleged, that the plaintiffs were stockholders in the Second National Bank of Franklin, located at Franklin, Johnson county; the bank being organized under the National Bank Act of Congress. The amount of stock held by the plaintiffs, respectively, is stated; that from January 1st, 1867, to the filing of the complaint, all the capital of the bank was invested in United States bonds and stocks, except the banking-house, on which all taxes had been paid; that under color of the act of the Legislature, of March 15th, 1867, the board of commissioners of the county assessed a tax, for State and county purposes, on their stock in bank for the year 1867; that the assessment was placed on the tax duplicate; and that pursuant to precept placed in his hands, the treasurer was proceeding to collect the tax, with penalties, etc., by levy and sale of plaintiffs' property; that none of the plaintiffs were residents of Johnson county, E. G. Whitney, Wm. B. Whitney, Maria Whitney and Thomas Reid, residing in Jefferson county, and all the others being citizens of Kentucky; that such had been their respective residences since prior to January 1st, 1867.

Prayer for perpetual injunction. The defendant demurred to the complaint. The demurrer was sustained by the court. Exception taken by plaintiffs.

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The plaintiffs abiding their complaint, final judgment against them went on the demurrer.

Plaintiffs appealed.

*T. A. Hendricks, O. B. Hord, A. W. Hendricks and A. E. Walker*, for appellants.

*T. W. Woollen, D. D. Banta and C. Byfield*, for appellee.

RAY, J. [After stating the facts.] The only question in this case is, does the act of March 15th, 1867 (Acts 1867, p. 216), authorize the collection of such tax.

The appellants contend that the act should be construed as having prospective operation only, and not as authorizing any such tax for the year 1867, because it has been the course of legislation in this State to impose all taxes for the year upon property declared subject to it, as the same exists or is owned on the 1st day of January in each year. That on the day named, this property was exempt from tax, and therefore worth more than if it had been taxed. Giving the act in question a retrospective operation would take away this additional value.

But it cannot reasonably be insisted that this additional value was not subject to the pleasure of the Legislature and liable at any moment to be taken away by the imposition of a tax. The argument results then in this, that as the Legislature had not heretofore subjected property free from tax on the 1st day of January to such a burden at a subsequent date, we are, therefore, not to place such a construction upon this act as would result from a change of legislative practice.

To this may be answered, that the Constitution of the State, article 10, section 1, requires the Legislature to "prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal," and that, therefore, where there has been a neglect of the Legislature to comply with this requirement and impose the tax at the usual time, it is our clear duty to aid by reasonable construction any attempt by that body to supply such omission. Nor can it be said that such a construction deprives the owner of property thus omitted of any right. All property is, by the Constitution, subject to this public burden, and it is also equitable that it should support its proportionate share.

That the tax was intended to apply for the year 1867 is evident

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from the language employed. The second section of the act requires the president or cashier of the bank to deliver a statement of the names and amount of interest of each stockholder to the proper county auditor on or before the 15th day of March in each year. The act was approved and went in force on that day. To enable bank officers to comply with the law for that year, however, the second section of the act declares, that "the sworn statement, required by the second section of this act, *may* be made for the year 1867, at any time on or before the 1st day of May, but for subsequent years *shall* be made within the time required by the said second section."

To construe the word "may" as simply permissive would render the provision not only idle, but absurd. It would be an insult to the Legislature to suppose that they intended to allow each bank to elect whether or not its stockholders should be taxed.

The next objection is to the law itself. While it is admitted that this law is within the act of Congress, it is contended that it is in conflict with a provision contained in the section of the State Constitution already cited, requiring "a uniform and equal rate of assessment and taxation." The specification is, that as to the listing and valuing of all his other personal property, each owner is allowed to attend to it himself, but as to National bank stock, he is represented by an officer of the bank. But as to real estate, he makes no return or estimate of value. In that case, as in this, such return and estimate are made by another person under oath. But this objection was disposed of in the case of *The Louisville & N. A. R. R. Co. v. The State ex rel. McCarty, etc.*, 25 Ind. 177, where the point was made, that where the law provided a special method for the appraisement of the real estate belonging to a railroad, it was in contravention of the constitutional provision in question, and was, therefore, void. But this court, in deciding that case, sustaining the law, said: "The Constitution does not require a uniform method of valuation of property, but only 'such regulations as shall secure a just valuation for taxation of all property, both real and personal.' The Legislature must use a discretion as to the best method of securing a just valuation of property, and unless the method adopted be clearly inadequate to secure that result, we cannot question its action."

It is objected, again, that the act requires the stock to be taxed where the bank is located, irrespective of the residence of the

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owner. It is not contended that this violates any act of Congress, but that it conflicts with the "general revenue system of the State." But we are referred to no provision of the Constitution which prohibits the Legislature from declaring that all National bank stock shall be taxed at the place where the bank is located, and that all shares in other corporations shall be taxed where the owners reside. The rate of assessment and taxation is still uniform and equal. That some of the stockholders are non-residents of the State is no reason for this exemption from taxation. "It is not necessary that a person, to be amenable to the taxing power of the State, shall be a citizen of the State, or domiciled within it." *Board of Supervisors v. Davenport*, 40 Ill. 197.

The final fault found with the act in question is, that it is ineffectual, because it provides that an officer of the bank shall list the stock. It is contended, that such officer is "an officer of one of the fiscal agents of the general government," and, therefore, the duty cannot be imposed upon him. As the duty is not inconsistent with the trust imposed upon him as such officer of such fiscal agent, we are not prepared to admit his exemption from State authority by virtue of his position.

In this case, however, the tax has been assessed, and whether or not the act provides for extreme cases is not necessary for our consideration now.

*Judgment is affirmed, with costs.*

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ROOT V. ERDELMAYER.

(37 Indiana, 225.)

*What is not a tax for "municipal purposes."*

Under a statute of Indiana, National bank stock was not taxable for municipal purposes. *Held*, that a tax for school purposes or for a donation by a township to aid in building a railroad was not a tax for "municipal purposes," and, therefore, not within the restriction.

WORDEN, C. J. Deloss Root, suing for himself as well as all others interested in the question, filed his complaint against the appellees, to restrain the collection of three items of taxes



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assessed against shares of the capital stock of the First National Bank of Indianapolis, viz.: first, a tax of twenty-five cents on the hundred dollars, levied by the school trustees of the city of Indianapolis, for school-house purposes in said city; second, a tax of one cent on the hundred dollars, levied for Center township; third, a tax of twenty cents on the hundred dollars, levied by the commissioners of Marion county, on the property of Center township, to aid, by way of donation, the Illinois Central Railway Company.

A demurrer was sustained to the complaint in the court below, at the Special Term, which ruling was sustained on appeal to the General Term.

The plaintiff below seeks a reversal of the judgment rendered against him on demurrer.

In respect to the item of taxes to aid the railway company, it may be observed that in the case of *John v. The Cin., etc., R. R. Co.*, 35 Ind. 539, this court decided that a township might aid, by way of subscription to the stock of a railroad company, as well as a county. And in the opinion of a majority of the court, a donation and subscription stand upon essentially the same ground. They are both provided for by law and must stand or fall together.

These observations bring us to the main and only other objection to the taxes in question, which is that they are assessed for "municipal purposes," in violation of section 9 of the act of March 15th, 1867 (3 Ind. Stat. 34), which provides as follows, viz.:

"Nothing in this, or any other act, shall be so construed as to authorize the taxation of stock in the bank of the State of Indiana, or in any National bank, for municipal purposes."

By the statute above cited, provision is made for taxing the shares of capital stock "in any bank or banking association, chartered or organized under the laws of this State, or chartered or organized under the laws of the United States, and having its banking-house, or place of business, in this State."

The question arises, what is meant by the words "municipal purposes," as used in the section above quoted?

The appellant contends that the words were used in the broad sense that would embrace taxation for county and township purposes, as counties and townships are municipalities. But in this broad sense a municipality embraces the State itself. This broad construction of the words would defeat the entire law, inasmuch as the State is as much a municipality as a county or township.

Webster says, "Municipal, as used by the Romans, originally designated that which pertained to a *municipium*, a free city or town. It still retains this limited sense, but we have extended it to what belongs to a State or nation as a distinct, independent body. Municipal law or regulation respects solely the citizens of a State, and is thus distinguished from commercial law, political law, and the law of nations."

We are of opinion that the word "municipal," as used in the above statute, was used in its original restricted sense, having reference to the incorporated cities and towns in the State having authority to levy and collect taxes, and that the restriction extends only to taxes for such city or town purposes. This construction is adopted from several considerations; first, if an enlarged meaning is to be given the word "municipal," so as to embrace counties and townships, no very good reason occurs to us why it should not embrace the State, which would defeat the law itself, or the section above set out would be nugatory; second, laws exempting property from taxation are to be strictly construed. *The Common Council of Indianapolis v. McLean*, 8 Ind. 328; third, the history of legislation on this subject places the construction we have adopted beyond reasonable question.

The charter of the bank of the State of Indiana contains the following section:

"SEC. 15. The capital stock of said bank shall be subject to the same rate of taxation for State and county purposes as the property or stock of other moneyed corporations; and the real estate and other property of said bank and branches, situated in any city or town, shall be taxable for municipal purposes, in the same manner as other property so situated, but the capital stock of said bank or branches shall not be taxable for municipal purposes." 1 G. H. 142.

In this section it is too clear to admit of controversy, that towns and cities are the municipalities contemplated, and that the prohibition to tax for municipal purposes is a prohibition only to tax for town or city purposes.

This prohibition was held valid in the case of *The Bank v. The City of New Albany*, 11 Ind. 139. In the case cited, there is no intimation that the prohibition extended beyond cities and towns.

If there is any such provision in the general banking law of the State, it has escaped our notice.

Then came the National banks. An act of Congress permits

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the shares in the capital stock of the National banks to be taxed by the States; provided, "that the tax so imposed under the laws of any State, upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the State where such association is located." See *Wright, Auditor, etc., v. Stilz*, 27 Ind. 338.

Now, in the act of March 15th, 1867, it is apparent that the Legislature intended to put the bank of the State and the National banks, in respect to taxation upon their shares of stock, upon an equality, and that they used the term "municipal purposes" therein in the same sense in which it was used in the act providing for the establishment of the bank of the State.

The township tax, and the tax levied by the board of commissioners for railroad purposes, are in no sense levied for municipal purposes within the meaning of the law in question. The same is also true with respect to the tax levied by the school trustees of the city for school-house purposes. These taxes for school-houses are not levied for any purposes of cities as such, but for a State purpose in the fullest sense of the term. They are levied to carry out the system of common school education provided for by the State, and by virtue of the laws of the State. To be sure, "each civil township and each incorporated town or city in the several counties of the State is hereby declared a distinct municipal corporation for school purposes." 3 Ind. Stat. 441, § 4. Thus each civil township in the State, as well as each incorporated city and town, is made an instrumentality by means of which the educational purposes of the State are carried out. But when taxes are assessed by means of these instrumentalities for building school-houses, they are assessed for school or educational purposes, and not for municipal purposes.

We are of opinion that no error was committed by the court below.

The judgment below is affirmed, with costs.

*S. E. Perkins, F. J. Mattler, and S. E. Perkins, Jr.*, for appellant.

*L. Barbour and C. P. Jacobs*, for appellees.

## WILEY v. STARBUCK.

(44 Indiana, 298.)

*Usury by National banks—Remedy for taking unlawful interest—Recoupment.*

By the statute of a State, six per cent was declared to be the legal rate of interest, but parties were authorized to agree in writing for a higher rate not exceeding ten per cent. *Held*, that National banks located in the State could charge ten per cent.\*

In an action on a note given for money borrowed of a National bank, the defendant cannot recoup illegal interest paid in advance. The remedies given by the National Banking Act for the taking of unlawful interest are exclusive and cannot be supplemented by the statutes of the State.†

**A**CTION on promissory notes. The opinion states the case.

*J. B. Julian* and *J. F. Julian*, for appellants.

*W. A. Bickle*, for appellee.

BUSKIRK, J. The action below was on two several writings obligatory, payable jointly and severally, as follows :

1. For one thousand two hundred dollars, dated December 7th, 1868, payable at ninety days, to Edward Starbuck, or order, at the First National Bank of Union City.

2. For four thousand dollars, dated November 1st, 1868, payable at sixty days to the First National Bank of Union City. This last note is indorsed to said Edward Starbuck by said bank. The notes in other respects are similar, and each contains waiver of demand of payment, notice, and protest, and authorizes any attorney at law to appear for the parties, or either, in any court in Indiana or Ohio, or elsewhere, and confess judgment for the note and interest, with damages on bills within the jurisdiction of the United States and without the jurisdiction of Ohio and Indiana, with costs, attorney's fees, and without relief, etc., and "with interest at ten per cent per annum, if not paid when due," etc.

To this action an answer in nine paragraphs was filed. The first is a general denial. The second was a general plea that the plaintiff

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\* See *Newell v. National Bank*, post.

† See *National Bank v. Davis*, ante, p. 350.

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was not the real party in interest, without the allegation of any facts. The third, general plea of payment. The fourth and fifth paragraphs are to the first paragraph of the complaint, which declares on the note for one thousand two hundred dollars payable to Starbuck. The fourth paragraph is pleaded to four hundred and eighty-one dollars of said note as the aggregate of the sums of thirty-seven dollars, alleged to have been "demanded," "received," and "reserved," by the bank at the end of each ninety days from the inception of the note, in December, 1865, to the giving of the note sued on; alleging that the note was given to Starbuck, president of the bank, to cover up the "illegal transaction of the bank;" that the sum of thirty-seven dollars was twelve per cent reserved by the bank "illegally;" that the said Starbuck had "no interest in the said money loaned, or the note given for the same."

The fifth paragraph is also pleaded to the first count, and is addressed to the interest of thirty-seven dollars paid on the note sued on and accruing interest. It alleges that the transaction was with the bank; that said Starbuck had no interest in the money loaned or note given.

The sixth and seventh paragraphs are pleaded, in the same order and substantially to the same effect as the above, to the second count on the four thousand dollar note.

The eighth is on the common money count for indebtedness of the bank to defendant in the month of September, 1870. The ninth paragraph was as follows:

"9th. The defendants Wiley and Wiley, for a ninth paragraph of answer, say that they are the sureties of the defendant McKemy on the notes sued on, he being the principal; that said notes were discounted by the First National Bank of Union City, an incorporation organized under the National Banking Law of the United States, and doing business in Randolph county, Indiana, and the money therein described was advanced and loaned by said bank, the said plaintiff being the president thereof and transacting the business, but having no interest whatever in said notes or the money loaned, and simply holding and taking the same in trust for the use of said bank, and taking one of them in his own name, and an assignment of the other with full knowledge of the facts stated, to cover up and conceal the illegal character and effect of the taking of illegal interest on said loan as hereinafter stated. And the said defendants say, that at the time of the discounting of the

said notes, the said bank illegally charged, contracted for, reserved, and received interest on said several sums of money at the rate of one and one-half per cent per month, in advance, during the ninety days following the several discounts of said several notes; wherefore, because of such illegal and unwarranted acts of said bank, the defendants say that said notes are void."

Issue was taken on the third and eighth paragraphs.

A demurrer was sustained to the second, fourth, fifth, sixth, seventh, eighth and ninth paragraphs of the answer, and proper exceptions were taken.

The cause was submitted to the court for trial and resulted in a finding for the plaintiff in the sum of five thousand four hundred and thirty-dollars and ninety-three cents.

The plaintiff moved the court for a new trial, for the following reasons:

1. The court erred in refusing to allow the plaintiff attorney's fees in said cause on said notes.
2. The court erred in refusing to compute interest on said notes from the date of each.

The defendants moved the court for a new trial for the reasons following:

1. Because the finding and judgment of the court is excessive.
2. Because the judgment ought to have been for the defendants.
3. Because the court erred in sustaining demurrers to the defendants' answer.

Both motions were overruled, and each party took an exception.

The plaintiff has assigned the following cross error:

That the court erred in overruling his motion for a new trial.

The defendants have assigned for error the sustaining of the demurrers to the answer of the defendants, and in overruling their motion for a new trial.

Did the court err in sustaining the demurrer to the several paragraphs of the answer?

The second paragraph of the answer was clearly bad, for the reason that it did not state facts sufficient to constitute a defense. *Raymond v. Pritchard*, 24 Ind. 318.

The fourth, fifth, sixth, and seventh paragraphs of the answer present for our decision the questions of what rate of interest the

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National banks may charge in this State, and whether a person who has paid an illegal rate of interest may deduct the amount so paid from the principal of the note, in an action upon such note.

The solution of these questions depends upon the construction to be placed upon the 30th section of the National Banking Law, and the laws of this State.

Section 30 of said law reads as follows :

"SEC. 30. And be it further enacted, that every association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State or Territory where the bank is located, and no more except that where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized in any such State under this act. And when no rate is fixed by the laws of the State or Territory, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid, shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of the interest thus paid from the association taking or receiving the same : Provided, that such action is commenced within two years from the time the usurious transaction occurred. But the purchase, discount, or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount, or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest."

The above section contains five distinct propositions, namely :

1. That every association may take, etc., on loans, etc., interest at the rate allowed by the laws of the State, etc., where the bank is located, and no more, except where a different rate is limited for banks of issue under the State, the same shall be allowed, etc., for such first-named associations.

2. When no rate is fixed by the laws of the State, they may take seven per cent.

3. The "knowingly taking," etc., a greater rate "than aforesaid" shall be held a "forfeiture of the entire interest which the note," etc., "carries with it, or which has been agreed to be paid thereon."

4. If a greater rate has been paid, twice the amount may be recovered, back, if the action is brought within two years from the time the usurious transaction occurred.

5. But the purchase, etc., or sale of bills of exchange, with current rate of exchange added to the interest, shall not be considered as taking or receiving greater interest.

Here, then, we have four rules prescribed for the taking of interest in the above first, second, and fifth subdivisions.

1. The rate allowed by the laws of any State, etc.

2. Any rate that any bank of issue in any State may take.

3. If no rate is fixed, seven per cent.

4. Current exchange added to interest.

There being a bank of issue, created by the laws of this State, we are required to ascertain what rate of interest may be charged and received by such bank.

The 13th section of the charter of the Bank of the State of Indiana reads as follows :

“SEC. 13. Said bank shall be entitled to charge and receive for money loaned the legal rate of interest established by law in this State, and not more, and the same may, according to bank rules, be taken in advance out of the sums loaned, and may be computed according to the standard and rate set forth in ‘Rowlet’s Tables,’ reckoning the days for which a note or bill has to run inclusively ; but it shall not, directly or indirectly, place any money in the hands of any broker or other person, to be loaned to others, or charge, take, or receive any interest, compensation, or benefit, whatever, from any loan made by any other person or party, whether such loan be made from its own funds or otherwise.” 1 G. & H. 141-42.

By the above section, the bank of the State is entitled to charge and receive the legal rate of interest established by the laws of this State.

The first section of an act concerning interest on money, approved March 9th, 1867, reads as follows :

“That interest upon the loan or forbearance of money, goods or things in action, shall be at the rate of six dollars a year upon one hundred dollars, and no greater rate of interest shall be taken, directly or indirectly, unless the agreement to pay a higher rate of interest be made in writing, and signed by the party to be charged ; but such rate of interest shall in no case exceed the rate of ten dollars a year on one hundred dollars ; but it may be taken yearly, or for any shorter period, in advance.” 3 Ind. Stat. 317.

By the above section, six per cent is the legal rate of interest in this State, unless there is an agreement in writing to pay a higher



rate of interest, signed by the party to be charged, but such rate of interest can in no case exceed the rate of ten per cent per annum.

The National banks organized and doing business in the State of Indiana may charge and receive interest<sup>t</sup> at the rate of ten per cent, to which may be added the current rate of exchange for sight drafts, where there is a purchase, discount or sale of a *bona fide* bill of exchange payable at another place than the place of purchase, discount or sale.

We proceed to inquire, whether the appellants had the right, in this action, to deduct from the principal of the notes sued upon the interest which had been paid in advance, the bank having charged and received illegal interest.

It is provided in the above quoted section of the National Banking Law, that "the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon;" and it is further provided in such section, that "in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of interest thus paid from the association taking or receiving the same."

It is very plain that where an action is brought by a National bank upon a note, bill, or other evidence of debt payable to or for the use of such bank, and it is shown that such bank had knowingly taken, received, reserved, or charged a greater rate of interest than is allowed by law, the entire interest which such note, bill, or other evidence of debt carries with it, or which has been agreed to be paid, is forfeited, and no recovery can be had for interest which remains unpaid.

And it is equally plain that where any person or persons have paid to any such bank a greater rate of interest than is allowed by law, such person or persons paying the same, or their legal representatives, may, in an action of debt against such bank, recover twice the amount of interest thus paid from the association taking or receiving the same.

But suppose a loan has been made of a National bank, and a note has been taken payable ninety days after date, upon which usurious interest has been charged and received in advance, and an action is brought upon such note, will the interest thus paid be regarded

and treated as a payment upon the principal of the note, or will the person paying the same be driven to his action of debt against the bank, to recover twice the amount of interest thus paid ?

The solution of this question depends upon whether we are to be governed exclusively by the National Banking Law, or whether the usury laws of this State have any application to an action brought by a National bank. In other words, are the defendants confined to the remedy conferred by the act of Congress, are the penalties prescribed by the act of Congress merely cumulative to those of the States, and may the penalties prescribed by the statutes of this State be set up as a defense ?

The precise question involved here came before the Supreme Court of New York, in the case of *The First National Bank of Whitehall v. Lamb*, 57 Barb. 429, where the court say : " The act of Congress in question is the only statute in existence, on that subject, enacted by the Federal Legislature ; it cannot therefore be said to be *in pari materia* with any other statute. The statutes passed by Legislatures under other governments have no influence or control over this ; and its construction is not controlled by them. It is to be construed by itself. It is repugnant to the provisions of no statute enacted by the same government ; and if repugnant to statutes under another government, it in nowise affects this. Other governments have no power to enact statutes which can limit or control the absolute, supreme and sovereign power of this government. Congress has not in this attempted to repeal or interfere with the statutes of the State of New York on the subject of usury, and have not the direct power to do so, should they attempt it. Nor has Congress, either in terms or by implication, adopted the statute law of New York, or its penalties, on this subject. With its own unrestrained power to legislate on this subject, it has matured its own independent project of governmental agencies, which stands alone as a single, separate and distinct system of banking and agency, unaided by, and disconnected with, other systems. It has conferred benefits upon the corporators themselves and perhaps upon the public ; and in consideration thereof has demanded and received in return, from these agencies, therefor, various and onerous duties, aids, securities and credits to the government, and from the institutions so authorized. These are to be regarded as fair and equal equivalents, with mutual considerations passing from the one to the other. The government was authorized to employ

them as depositories of the public moneys, and as financial agents of the government, and their supervision was committed to an agent of the Federal government. The institutions were bound to deposit securities for the government's protection, and also to keep deposits and accumulate a surplus fund for that purpose. It has, in this system, permitted the institutions to receive a fixed and fair equivalent, to be received for loans and discounts to individuals, of money upon notes and bills of exchange, and at the same time has thrown its protecting influences over such individuals to prevent abuse and oppression (as it must be supposed) by adequate penalties to be inflicted for violations of the statute. In other words, for the value to the corporators of chartered rights and privileges conferred, the government imposed certain burthens upon these agencies as a condition to the grant; and the conferring and receiving of these reciprocal benefits, with these duties and burthens and subject to its penalties, are the terms, and these only, of the compact between the government and the corporators in these institutions. 'No other burthens are annexed to the enjoyment of the rights and privileges conferred by this act of Congress.' " *Van Allen v. The Assessors*, 3 Wall. 583.

Some of the evil consequences, which would result from holding that the penalties prescribed by the acts of Congress are cumulative only, are pointed out in the opinion of the court in the above case, where the court say: "If the penalties given by the act of Congress are cumulative, leaving the State law also in force, the penalties in the former would probably never be set up as a defense; the latter being a defense to the whole contract, principal and interest, while the former goes only to the interest. So if both are in force, the State law can first be used to defeat the entire recovery upon the contract, which is thereby made void; and by the law of Congress there would be superadded, by way of further penalty, the liability to have recovered back twice the amount of the interest that had been paid. I do not think it reasonable to suppose that Congress intended to add to the penalties existing by the State law. That was no part of the reason for its enactment, and therefore the law of Congress is not cumulative."

The same consequences and confusion would result in this State. As we have seen by the act of Congress, there are imposed, as penalties for usury, the forfeiture of the entire interest unpaid and the right to recover back twice the amount paid. While in this

State, the excess only over the legal rate of interest can be recouped, in an action upon the instrument affected with usury.

It was decided by this court, in *Musselman v. McElhenny*, 23 Ind. 4, that, "if usurious interest is paid on the note after its execution, it amounts to a payment of so much on the principal of the note; and if the amount thus paid exceeds the principal, it may be recovered back."

It was held in *Yancy v. Teter*, 39 Ind. 305, that the excess over the rate of interest as fixed by the statute of the contract of the parties could be recovered back or recouped.

If the penalties prescribed by the act of Congress and of this State are to be enforced, then it would seem that in an action on an instrument tainted by usury, the illegal interest that had been paid would be regarded as a payment upon the principal, and the party could afterward recover in an action against the bank twice the amount of the interest paid.

It is finally insisted by counsel for appellee, that the fourth, fifth, sixth, and seventh paragraphs of the answer were bad, because it is not alleged that the usurious interest was corruptly reserved and received.

It was held in *The Bank of the U. S. v. Owens*, 2 Pet. 527, and in the case of *The Bank of the U. S. v. Waggener*, 9 id. 378, that the word "corruptly" meant intentionally and designedly. The language of the present National Banking Law is "knowingly," and it is charged in the several paragraphs of the answer that the contract for the usurious interest was knowingly made, and we think that such averment is equivalent to charging that it was corruptly made, even if, under the usury laws of this State, it was necessary to charge that the contract was corruptly made.

It was held in *Cohee v. Cooper*, 8 Blackf. 115, that in a plea of usury it was necessary to charge that the unlawful interest was corruptly reserved, and such ruling was followed in subsequent cases; but in the well-considered case of *Cole v. Bansemer*, 26 Ind. 94, it was held that under the usury laws as they have existed since 1861, such allegation was unnecessary.

The court in that case say: "There is therefore now no reason here for the allegation that the contract was corruptly made, and the rule of pleading requiring it must consequently be deemed to have ceased to exist."

It is very plain and obvious to us, that the appellants were not

## City of Richmond v. Scott.

entitled in this action to recoup the interest which they had paid upon the notes in suit. The facts stated in the paragraphs under examination are sufficient to show that the transaction was with the bank, and not with the plaintiff, and that the bank is chargeable with the acts of the plaintiff as the president thereof, and that the penalties prescribed by the act of Congress attach in the same manner, and to the same extent, as though the action was brought by and in the name of the bank. But it does not result from this, that the action could not be maintained by the plaintiff, for the facts alleged show that he was the trustee of an express trust and as such was entitled to maintain the action. *Heavenridge v. Mondy*, 34 Ind. 28.

It results, from what has been said, that the court below committed no error in sustaining the demurrer to the fourth, fifth, sixth and seventh paragraphs of the answer.

[The court then decided that the taking of illegal interest did not render the contract void; a point settled by the Supreme Court of the United States in *Farmers and Mechanics' National Bank v. Dearing*, ante, p. 117.]

## CITY OF RICHMOND v. SCOTT.

(48 Indiana, 568.)

*Taxation — Discrimination — Double taxation.*

State banks were exempt from taxation under a statute passed prior to the National Banking Act. *Held*, that shares in National banks could nevertheless be taxed.\*

A tax was levied on money belonging to plaintiff on the first day of January. In March, he bought, with this money, shares in the stock of a National bank. *Held*, that the shares could be also assessed under a statute providing that persons should be assessed for bank stock held by them on April first.

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\* See *Lionberger v. Rouse*, ante, p. 41; *Hepburn v. School Directors*, ante, p. 113; *Adams v. Mayor*, ante, p. 148.

FROM the Wayne Circuit Court.

*W. A. Bickle*, for appellants.

*J. P. Siddall* and *C. H. Burchenal*, for appellee.

WORDEN, J. This was a complaint by the appellee against the city of Richmond and her treasurer, to enjoin the collection of certain taxes levied by the city upon the shares of stock held by the appellee in the Richmond National Bank, a corporation organized under the General Banking Law of the United States. It appears that the taxes were levied for the year 1873, at the same rate as was levied upon real and other personal property within the city.

There were two paragraphs in the complaint, one alleging that the bank was organized on the 1st of March, 1873, and that on or about that day the plaintiff became the owner of the stock; the other alleging, that the bank was organized in March, 1872, when the plaintiff became the owner of the stock. It appears from the complaint, that there are several branches of the Bank of the State of Indiana, organized under "an act to establish a bank with branches," passed March 3, 1855, still in existence. See 1 G. & H. 139. Demurrers to each paragraph of the complaint, for want of sufficient facts, overruled, and exception. Final judgment for the plaintiff. The errors assigned call in question the correctness of the ruling on the demurrers.

The taxes appear to have been regularly levied, and no objection is made to their validity, except that the law under which the levy was made is invalid, or, if valid, that it does not authorize the levy for the year 1873.

The taxes are expressly authorized by the act of March 4th, 1873 (Acts 1873, p. 214), by which it is clearly contemplated that they may be levied for the year 1873, as well as subsequent years. See, on this point, *DePauw v. The City of New Albany*, 22 Ind. 204; *Whitney v. Ragsdale*, 33 id. 107.

The first section of the statute last above cited attempts to authorize the levying of taxes, for municipal purposes, upon "the shares of capital stock owned or held by any person or body corporate, in any bank or banking association, chartered or organized under the laws of this State, or chartered or organized under the

laws of the United States (including the Bank of the State of Indiana, and its several branches, and National banks or banking associations)."

It is claimed, that as the 15th section of the act to establish a bank with branches, *supra*, provides that "the capital stock of said bank or branches shall not be taxable for municipal purposes," it follows, that the shares of stock in the National banks are entitled to the same immunity. This is based upon the theory that no tax can be imposed by a State upon the stock in National banks, except such as is imposed upon the stock of the most favored banks in the State. The 41st section of the act of Congress providing for National banks (13 Stat. at Large, 3) places the shares of stock in them within the taxing power of the States, on two conditions; that the taxes assessed under State authority shall not be higher than is assessed upon other moneyed capital in the hands of its own citizens; and that the tax imposed upon the shares shall not be at a greater rate than is imposed upon the shares in any banks organized under State authority.

We shall enter upon no discussion of the question, whether the State can authorize any assessment for municipal purposes upon the shares of stock in the Bank of the State of Indiana. The charter of the bank has been supposed to be a binding compact between the State and the corporation, including its stockholders, which would prevent the imposition of such taxes, if the Constitution of the United States, as expounded in the Dartmouth College case and the unnumbered cases following it, affords any protection. No power is reserved to the State to amend or alter the charter, except "by and with the consent of the president and directors of the bank, and of the president and directors of each branch." § 91.

We shall take for granted, for the purposes of this case, that such taxes cannot be imposed, and that the provision in our statute authorizing such assessment is unconstitutional and void. But it by no means necessarily follows, that the part of the law providing for an assessment of shares of stock in the National banks is void. These provisions are so distinct and separate that one may stand and the other fall.

The Bank of the State of Indiana was chartered in 1855, with the provision, as we have seen, that the capital stock of the bank and branches should not be taxable for municipal purposes. After the National Banking Law passed, most of the banking business of

the State was done by the National banks. Some half dozen branches of the Bank of the State of Indiana, however, are still in existence.

A construction has been placed upon the second proviso to the forty-first section of the National Banking Law, by the Supreme Court of the United States, in the case of *Lionberger v. Rouse*, 9 Wall. 468 (*ante*, p. 41), which clearly establishes the validity of the tax in question here, although the State had, before the passage of the National Banking Law, so tied up her hands as that she could not impose the like tax upon the stock of the Bank of the State of Indiana, even had the second proviso remained in force. In that case, it was held that the proviso was a measure that had reference to prospective legislation by the States, and its object was accomplished when the States conformed, as far as practicable, their revenue systems to it. The court, after discussing the point at some length, say: "Without pursuing the subject further, it is enough to say, in our opinion, Congress meant no more by the second limitation in the proviso to the forty-first section of the National Banking Act, than to require of each State, as a condition to the exercise of the power to tax the shares in National banks, that it should, as far as it had the capacity, tax in like manner the shares of banks of issue of its own creation."

The National Banking Act, however, was modified in 1868, so that the limitation above mentioned does not exist at all. An act of Congress, approved February 10th, 1868 (see 15 Stat. at Large, p. 34), entitled "an act in relation to taxing shares in National banks," provides, amongst other things, that "the Legislature of each State may determine and direct the manner and place of taxing all the shares of National banks located within said State, subject to the restriction that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State." Thus the provision, as it stood in the original act of Congress, that the tax to be imposed by the States upon shares of stock in the National banks should not exceed the rate imposed upon the shares in any of the banks organized under the authority of the States, is swept away. The only limitation now is, that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State. It is not shown; nor is it claimed, that the tax in question violates the provision above quoted of the act of 1868.



It is clear, therefore, that the second paragraph of the complaint did not allege facts sufficient to constitute a cause of action, no good ground being shown for enjoining the collection of the taxes specified in that paragraph.

The first paragraph alleges, as before stated, that the bank was organized, and the plaintiff acquired his stock, on the 1st of March, 1873, and it is insisted, that as he was not the owner of the stock on the 1st of January of that year, he cannot be charged with any municipal taxes upon it for that year. It is assumed, that as a general rule, municipal taxes can be assessed against persons only for property held by them on the 1st of January. See the act for the incorporation of cities. 3 Ind. Stat. 63.

By the act to provide for a uniform assessment of property, etc. (Acts 1872, p. 57), the 1st of April in each year is the day fixed for the government of assessments. Persons are to be assessed for what property, real or personal, may be owned by them on that day. §§ 37 and 38 of the act above cited. Shares of stock are to be assessed according to their value on that day. § 63.

This act does not in terms apply to assessments for municipal purposes, unless we have overlooked some of its provisions. But the act of March 4th, 1873, *supra*, clearly contemplates that the assessments of bank shares for municipal purposes shall be based upon the same statements that are required to be made by the act of 1872, for general purposes, and thereby the 1st of April becomes the day in each year to which reference must be had in determining for what shares of stock a person is liable under the law to be taxed for municipal purposes.

But it is insisted that the law is unconstitutional, inasmuch as one period of time is referred to in determining for what shares of stock a person shall be assessed for municipal purposes, and another period in determining for what other property he shall be assessed for the same purposes.

The Constitution, article 10, section 1, provides, that "the General Assembly shall provide by law for a uniform and equal rate of assessment and taxation; and shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal," etc. Without deciding whether this provision of the Constitution, if it applied to municipal taxation, would be violated by the law in question, we are of opinion that the provision can have no reference to municipal taxation. There cannot

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in the nature of things, be a uniform rate of taxation for municipal purposes. Taxes for corporate purposes cannot be equal. The wants and necessities of towns and cities cannot be equal. Some require a higher and some a lower rate of taxation. See *The Bank, etc., v. The City of New Albany*, 11 Ind. 139; *Bright v. McCullough*, 27 id. 223.

We are of opinion, therefore, that the law is not unconstitutional.

As the appellee owned his stock on and before the 1st of April, 1873, we think he was liable to be taxed thereon for that year for municipal purposes; and we conclude, therefore, that the first paragraph of the complaint, as well as the second, fails to state facts sufficient to constitute a cause of action, and that the demurrer to it, as well as to the second, ought to have been sustained.

The judgment below is reversed, with costs, and the cause remanded, with instructions to the court below to sustain the demurrers to each paragraph of the complaint.

DOWNEY, J., was absent when this cause was considered.

ON PETITION FOR A REHEARING.

WORDEN, J. In one of the paragraphs of the complaint, in this case, it is alleged, that the money with which the plaintiff purchased his bank-stock on or about the 1st of March, 1873, was assessed against him by the city as having been owned by him on the 1st of January of that year, and that he has paid the taxes thereon; and it is claimed that he cannot be assessed for the stock held by him on the 1st of April, because he paid the taxes on the money with which the stock was purchased, for the same year.

On this point a rehearing is asked for.

We are of opinion, upon a re-examination of the statute, that municipal taxes generally, not including those assessed upon bank-stock, as provided for in the act of March 4th, 1873, are to be assessed upon persons for what they have on the 1st of January in the current year, as intimated in the original opinion.

The plaintiff was rightfully assessed for the money which he held on the 1st of January. It was optional with him to purchase the bank-stock before the 1st of April. He must be supposed to have done so with the knowledge that the city might impose the tax upon him for the stock which he held on that day. There may be a hardship in the law as it applies to some particular cases,

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but this does not render it unconstitutional or invalid. It is impossible to so frame a law for the assessment and collection of taxes, as that it will not in some cases work a hardship. Says Mr. Cooley (Const. Lim. 513): "Absolute equality and strict justice are unattainable in tax proceedings. The Legislature must be left to decide for itself how nearly it is possible to approximate so desirable a result. It must happen under any tax law that some property will be taxed twice, while other property will escape taxation altogether. \* \* \* Nevertheless, no question of constitutional law is involved in these cases, and the legislative control is complete."

In this case, if the plaintiff had acquired the money after the 1st of January, and purchased the stock after the 1st of April, he would have escaped municipal taxation on either for that year. But as he owned the money at the time it was assessed to him, and the stock at the time that was assessed to him, we see no legitimate way in which he can escape payment of the assessment on both. If the plaintiff is not liable for the tax on the stock for the year 1873, then the stock escapes municipal taxation altogether for that year.

The petition for a rehearing is overruled.

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NATIONAL STATE BANK OF OSKALOOSA V. YOUNG.

(25 Iowa, 311.)

*Taxation of personal property of National banks.*

The personal property and assets of National banks, such as safes, office furniture, etc., are not taxable.

**B**ILL in chancery to enjoin the collection of a certain tax alleged to be illegally assessed against plaintiff, upon \$61,260 of personal property.

Decree in the District Court perpetually enjoining the collection of the tax.

Defendant appeals.

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*Z. F. Fisher*, for appellant.

*Seever & Cutts*, for appellee.

BECK, J. The cause was before us at the June term, 1867, upon the appeal of the defendant, from an order overruling a demurrer to plaintiff's bill. The judgment of the District Court was affirmed and the cause remanded. Upon a trial, the defendant having answered the petition, a decree, as prayed for by plaintiff, was entered, and defendant again appeals to this court.

The plaintiff is a banking association, organized prior to January 1, 1866, under the act of Congress of June 3, 1864, with a capital stock of \$100,000. It was assessed for taxation, for the year 1866, in the sum of \$61,260, upon personal property, by the assessor, and return of such assessment duly made. The basis of this assessment appears to have been the capital stock of the bank, after deducting the value of government bonds deposited with the Treasurer of the United States, and real estate held by the bank. The plaintiff claims that, under the decision of this court, the assessment is illegal, the capital stock not being subject to taxation. See *Hubbard v. Supervisors of Johnson County*, 23 Iowa, 130.

The defendant maintains that, while the capital of the bank is not subject to taxation as such, yet personal property held by it is liable to taxation, as like property held by other incorporations or citizens of the State, and that all such property or means of the bank, excepting United States bonds, are taxable as personal property. In other words, that the safes, office furniture, cash on hand and due from other banks, bills discounted, etc., etc., which make up what is called assets, are subject to taxation.

The case presents the question as to what extent the National banks are subject to taxation by the State and involves the construction of the act of Congress creating them.

It is proper to remark, that, under the theory of defendant's counsel, which is in effect that the property of the bank should be assessed as other property, his estimate of the amount or value upon which tax should be paid is erroneous and would operate most unjustly. The cash on hand, cash items, bills receivable and amounts due from other banks, under his view of the law, should be assessed as moneys and credits; if that be so, from the amount thereof the *bona fide* debts of the bank, such as the amount due depositors and the circulation, should be deducted. But the bank

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is charged in making the assessment with all its cash and credits, but no deduction is made for its debts. This is in violation of the rule which is advocated by defendant's counsel.

Section 41 of the act of Congress, approved June 3d, 1864, authorizing the organization of National banks, provides that, "in lieu of all existing taxes every association shall pay to the Treasurer of the United States" certain duties upon its circulation, deposits, and capital stock not invested in United States bonds, and in these words: "That nothing in this act shall be construed to prevent all the shares of said association held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority, at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State." \* \* \* "*Provided, also*, that nothing in this act shall exempt the real estate of associations from either State, county, or municipal taxes to the same extent, according to its value, as other real estate is taxed."

From the payment of what taxes does this act exempt these associations? The language of the act replies in explicit terms, "*all existing taxes*," that is, all actual assessments for revenue that are denominated taxes. The terms include all State, county or municipal taxes. The power of Congress thus to legislate is not doubted, and we are not aware that it is denied. That such was the intention of Congress is most apparent from the language of the section above quoted, as well as from the context. The shares of the bank, and not estate owned by it, are excepted from the exemption by express words, and the State is permitted to tax such property. The express grant of this power to tax specific property is conclusive evidence of the intention to withhold the power to tax other property. *Expressio unius est exclusio alterius*. Neither are the taxes from which the banks are exempt such as may be levied upon particular kinds of property or in a particular manner, but all assessments for revenue that may be intended by the general term "taxes," are included within the language of the law.

We conclude, therefore, that no revenue can be collected by a State, county or municipality from banks organized under this act, except by assessments upon their shares and real estate. This conclusion we conceive to be consistent with just and equitable taxa-

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tion. The shares of the stockholders represent the capital of the institution. To tax the shares and also the property of the bank would be double taxation.

A and B are equal partners in a mercantile firm, with a capital of \$100,000 invested in goods. It would be gross injustice to require each partner to pay taxes on \$50,000 for his *interest* in the firm, and to tax the firm on \$100,000 for the goods in which the capital is invested. Now, the interest which the partner has in the firm is precisely the same that the stockholder has in the bank, which is called *shares*. It would be double taxation and gross injustice to assess taxes on both the shares and the property which those shares represent.

The defendant insists that the plaintiff did not make a proper application to the supervisors for the correction of the assessment roll, and cannot, therefore, have relief in this action. Without determining that such an application was necessary, we find by the evidence that it was made.

The cashier of defendant, upon application of the assessor, rendered a sworn statement, from which the assessment was made. It is claimed by defendant's counsel that plaintiff is thereby estopped to deny the correctness of the assessment and tax; this by no means follows. It does not appear that the cashier intended to bind plaintiff to pay the tax, or if he so intended, that he had the power so to do.

The decree of the District Court is

*Affirmed.*

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TURNER V. THE FIRST NATIONAL BANK OF KEOKUK *et al.*

(26 Iowa, 562.)

*National banks : Suspension of — What are debts against — Parties.*

Under section 50 of the act entitled "An act to provide a National currency," etc., the assets in the hands of the receiver of a bank that fails are, when reduced to money, to be ratably divided and appropriated to the payment of all legal liabilities of the association, whether such liabilities are debts, technically so called, or result from the non-feasance or malfeasance of the association

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in respect of its binding obligations and duties—as from its failures while in possession of bonds left by an individual with it on special deposit or for safe-keeping.\*

In a proceeding for the adjudication of a claim against a National bank that has suspended, the receiver appointed under the National Banking Act may be properly joined as a party defendant.

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\* Section 50 of the National Banking Act is substantially repeated in the Revised Statutes, sections 5234 to 5237 inclusive. By section 3 of an act of Congress approved June 30, 1876, it is provided as follows:

“SEC. 3. That whenever any association shall have been or shall be placed in the hands of a receiver, as provided in section fifty-two hundred and thirty-four and other sections of said statutes, and when, as provided in section fifty-two hundred and thirty-six thereof, the Comptroller shall have paid to each and every creditor of such association, not including shareholders who are creditors of such association, whose claim or claims as such creditor shall have been proved or allowed as therein prescribed, the full amount of such claims and all expenses of the receivership, and the redemption of the circulating notes of such association shall have been provided for by depositing lawful money of the United States with the Treasurer of the United States, the Comptroller of the Currency shall call a meeting of the shareholders of such association by giving notice thereof for thirty days in a newspaper published in the town, city or county where the business of such association was carried on, or if no newspaper is there published, in the newspaper published nearest thereto, at which meeting the shareholders shall elect an agent, voting by ballot, in person or by proxy, each share of stock entitling the holder to one vote; and when such agent shall have received votes representing at least a majority of the stock in value and number of shares, and when any of the shareholders of the association shall have executed and filed a bond to the satisfaction of the Comptroller of the Currency, conditioned for the payment and discharge in full of any and every claim that may hereafter be proved and allowed against such association by and before a competent court, and for the faithful performance and discharge of all and singular the duties of such trust, the Comptroller and the receiver shall thereupon transfer and deliver to such agent all the undivided or uncollected or other assets and property of such association then remaining in the hands or subject to the order or control of said Comptroller and said receiver, or either of them; and for this purpose, said Comptroller and said receiver are hereby severally empowered to execute any deed, assignment, transfer, or other instrument in writing that may be necessary and proper; whereupon the said Comptroller and said receiver shall by virtue of this act be discharged and released from any and all liabilities to such association, and to each and all of the creditors and shareholders thereof; and such agent is hereby authorized to sell, compromise or compound the debts due to such association upon the order of a competent court of record or of the United States Circuit Court for the district where the business of the association was carried on. Such agent shall hold, control and dispose of the assets and property of any association which he may receive as hereinbefore provided for the benefit of the shareholders of such association as they, or a majority of them in value or number of shares, may direct, distributing such assets and property among such shareholders in proportion to the shares held by each; and he may, in his own name or in the name of such association, sue and be sued, and do all other lawful acts and things necessary to finally settle and dis-

**A**CTION to recover the value of \$1,500, of seven-thirty bonds of the United States, dated July 15, 1865, left by plaintiff with the First National Bank of Keokuk on special deposit, or "for safe-keeping." The bank failed, and the defendant, H. W. Sample, was appointed receiver, by the Comptroller of the Currency, under the "Act to provide a National currency," etc., approved June 3, 1864. The petition alleges the deposit of the bonds; the receipt of the interest on the coupons from the cashier of the bank every six months, up to and including January, 1868; the failure of the bank; the appointment of Sample as receiver, and his refusal to allow the claim of plaintiff, or to pay it, or any part of it; that the bonds were received by the bank, according to its custom, and in the ordinary course of business; that they were either in the bank at the time of its failure, or were fraudulently removed or embezzled by some officer or agent thereof, by the gross negligence and want of care and prudence on the part of the bank; that the claim is unpaid, and there is no just set-off to it.

An amendment to the petition was filed, alleging that the bank agreed to safely keep said bonds and return them to plaintiff, on demand; that plaintiff has not received said bonds, or their value; that he has demanded the return of said bonds, of Sample, receiver, since the failure of said bank, and that he refused to deliver the same.

To this petition and amendment the defendant, Sample, receiver, demurred, because : 1. They do not state facts sufficient to constitute a cause of action ; 2. It appears therefrom that the relation of bailor and bailee of the bonds existed between the plaintiff and the bank, and no conversion, except in the alternative, is alleged ; 3. There is an improper joinder of causes, tort and contract ; 4. There is an improper joinder of parties, the bank and receiver ; 5. That the plaintiff shows himself a bailor, and not a creditor of the bank ; and the receiver cannot be liable for the wrongful acts of the bank. This demurrer was overruled, and the defendant, Sample, receiver, appeals.

*R. P. Lowe*, for appellant.

*Rankin S. McCrary*, for appellee.

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tribute the assets and property in his hands. In selecting an agent as hereinbefore provided, administrators or executors of deceased shareholders may act and sign as the decedent might have done if living, and guardians may so act and sign for their ward or wards."



COLE, J. The main point relied upon in argument by the appellant's counsel is, that the claim of the plaintiff is not a *debt* of the bank, under the 50th section of the act of Congress, entitled, "An act to provide a National currency, etc.," approved June 3, 1864. The section is as follows :

"That on becoming satisfied, as specified in this act, that any association has refused to pay its circulating notes, as therein mentioned, and is in default, the Comptroller of the Currency may forthwith appoint a receiver, and require of him such bond and security as he shall deem proper, who, under the direction of the Comptroller, shall take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to such association, and, upon the order of a court of record, of competent jurisdiction, may sell or compromise all bad or doubtful debts, and, on a like order, sell all the real and personal property of such association, on such terms as the court shall direct; and may, if necessary to pay the debts of such association, enforce the individual liability of the stockholders, provided for by the 12th section of this act; and such receiver shall pay over all moneys so made to the Treasurer of the United States, subject to the order of the Comptroller of the Currency, and also make report to the Comptroller of the Currency of all his acts and proceedings. The Comptroller shall, thereupon, cause notice to be given, by advertisement in such newspapers as he may direct, for three consecutive months, calling on all persons who may have claims against such association to present the same, and to make legal proof thereof. And, from time to time, the Comptroller, after provision shall have been first made for refunding to the United States any such deficiency, in redeeming the notes of such association, as is mentioned in this act, shall make a ratable dividend of the money so paid over to him by such receiver, on all such claims as may have been proved to his satisfaction, or adjusted in a court of competent jurisdiction; and, from time to time, as the proceeds of the assets of such association shall be paid over to him, he shall make further dividends, as aforesaid, on all claims previously proved or adjusted; the remainder of such proceeds, if any, shall be paid over to the shareholders of such association, or their legal representatives, in proportion to the stock by them respectively held. Provided, etc. \* \* \* \*"

We have copied the entire section, it being the best negation which could be made of the position assumed by appellant's counsel. It is argued by counsel that the language "and may, if necessary to pay the debts of such association, enforce the individual liability," etc., limits the liability to "debts," technically so called; or, at least, that the word "debt" necessarily implies the relation of creditor and debtor, and cannot be extended to the obligations resulting from the relation of bailor and bailee. But the error of this strict construction will be seen from the subsequent language of

the section, that the Comptroller shall give notice to "all persons having *claims*," etc., and that he "shall make a ratable dividend of the money so paid over to him by such receiver on *all such claims* as may be proved to his satisfaction or adjusted in a court of competent jurisdiction," and from time to time shall pay "*on all claims* previously proved or adjusted," etc. In our opinion it is reasonably clear, from the language of this section and the entire act, that the assets of the association in the hands of the receiver, or when reduced to money and placed subject to the order of the Comptroller, are to be ratably divided and appropriated to the payment of all legal liabilities of the association, whether such liabilities are debts, technically so called, or result from the non-feasance or malfeasance of the association in respect of its binding obligations and duties. \* \* \* \* [The court then disposed of some questions of practice.]

The fourth ground of demurrer is, that the defendant, Sample, receiver, is improperly joined as a party with the bank; it appearing from the petition, that said bank has failed, and its powers and functions suspended by the appointment of a receiver, and made incapable of being sued.

By the fourth subdivision of section 2876, Code of Iowa, it is made a ground of demurrer, "that there is a defect of parties, plaintiffs or defendants." But it has been held, under statutes identical with this, that a defendant cannot demur to the complaint because others are improperly, or unnecessarily, made defendants. *Pinckney v. Wallace*, 1 Abbott (N. Y.), 82; *Voorhies v. Baxter*, id. 44. And also, that where there is a defect of parties, by non-joinder, that is, where necessary parties are omitted, the defendant may demur; but where there is a misjoinder, that is, where persons who ought not to be, are made defendants, the defendant with whom they are thus improperly joined, cannot demur, for that reason, and can only take advantage of the misjoinder by motion to strike out the names of those improperly joined. *Dean v. English*, 18 B. Monr. (Ky.) 136; *Gregory v. Oaksmith*, 12 How. (N. Y.) 134; *Peabody v. Wash. Co. Mutual Insurance Co.*, 20 Barb. 339; *Brownson v. Gifford*, 8 How. (N. Y.) 389; *Beckwith et ux. v. Dargets*, 18, Iowa, 303.

But without resting our decision solely upon this construction of the statute, let us examine the case upon its merits, in respect of this question. By section 46 of the act aforesaid, it is provided

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that after the default, or failure of the bank, and notice by the Comptroller to the association, "it shall not be lawful for the association suffering the same, to pay out any of its notes, to discount any of its notes or bills, or otherwise prosecute the business of banking, except to receive and safely keep money belonging to it, and to deliver special deposits." \*

From this it is clear that the bank, after its failure, might properly deliver to plaintiff the bonds sued for; and if they are still in its possession the duty is devolved upon it to deliver the same. If the bonds have come to the possession of the receiver, it would be also very clearly his duty to deliver the same to plaintiff. If they had been converted into money by the bank, and the proceeds placed in its common funds, and in that way passed to the receiver; or by the gross negligence of the bank the bonds were lost, so as to render the bank liable to the plaintiff for their value; in either alternative of this latter proposition, it seems to us, the receiver is a proper party, as being the active agent or fiduciary, through whom, under the direction of the Comptroller, the affairs of the bank are to be closed and settled.

Under the peculiar and indefinite language of section 50 of the act aforesaid, it is a question of great doubt, whether the receiver or Comptroller is the proper party to proceedings for the adjudication of claims spoken of in said section. But since the receiver is upon the ground, and within the same jurisdiction as the bank whose assets, etc., he holds, gives bond and security for the faithful discharge of his duties, and is made the active agent for the protection of the bank and its creditors, we are, for these and other reasons, inclined to, and do, hold, that the receiver is a proper party in proceedings for the adjudication of claims against the bank.

Under our Revision, section 2761, any person may be made a defendant who has, or claims, an interest in the controversy adverse to the plaintiff; or who is a necessary party to a complete determination or settlement of the question involved in the action." As we have just seen, the receiver is a proper party, as representing an interest adverse to the plaintiff, and since the bank might rightfully and had the legal duty to deliver the bonds to plaintiff if it still held them, the bank is a necessary party to the complete determination of the question involved. We conclude, therefore,

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\* The same language is used in Rev. Sts., § 5228.—REP.

even if the question of misjoinder could be made by demurrer, that there was no error in overruling it on this ground.

V. As to the fifth ground of demurrer, that the receiver cannot be made liable to the plaintiff, a bailor, for the wrongful or criminal acts of the bank, it is only necessary to remark that it is not sought to make the receiver liable, but to make the bank liable, through the receiver.

The point as to the plaintiff being a bailor, rather than a creditor, has been already disposed of. The positions assumed and argued with the characteristic zeal, learning and ability of the counsel for appellant as to the rights of a special depositor; the retention of the title by him; that the right or title to such deposits does not pass to an assignee or receiver; the necessity for averment of conversion or demand and refusal, etc., may well be conceded. In the view we take of the pleadings, these questions do not at all interfere with our duty to order the judgment of the District Court to stand

*Affirmed.*

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### MORSEMAN V. YOUNKIN.

(27 Iowa, 350.)

#### *Taxation of National banks — Construction of Iowa statute.*

A State statute providing for the taxation of shares in National banks having been declared illegal by the court because the capital instead of the shares of State banks were taxed, the Legislature passed a new statute for taxing shares in National banks, and therein repealed "all acts and parts of acts inconsistent" with its provisions. *Held*, that the repealing clause amounted to a repeal of the provision taxing the capital of State banks, and since those banks, if any there were, could be taxed on their shares under the general revenue law of the State, the provision for taxing National banks was in accordance with the act of Congress.

ACTIONS involving the legality of a tax assessed on National bank shares. There were four cases decided at the same time.

*Edmunds & Ransom, Clark & Haddock, James T. Lane, Stuart & Armstrong*, for plaintiffs.

*Henry O'Connor, John Williams, J. D. Campbell*, for defendant.

WRIGHT, J. It was held in *Hubbard v. Supervisors of Johnson Co.*, and the other cases therewith decided, 23 Iowa, 130, by a majority of the court, under the provisions of the 41st section of the act of Congress of June 3, 1864, and the statutes of the State as they then stood, that there could be no taxation of the *shares* in National banks. Without repeating them, we refer to the facts of the cases there decided, that the points then and now ruled may be the better apprehended and understood.

In 1868 (February 10, the case above referred to was ruled in July, 1867), Congress passed an act entitled "An act in relation to taxing shares in National banks," containing this provision: "And the *Legislature* of each State may determine and direct *the manner and place of taxing of all the shares* of National banks located within said State."

In April, 1868, the General Assembly of the State passed an act for the taxation of the shares of National banks (Laws of 1868, p. 213), which provides: that all the shares of the associations, held by any person or persons, shall be included in the valuation of the personal property owned by them; but not at a greater rate than is assessed on other moneyed capital in the hands of individuals in this State.

The second section declares that if Congress should change, alter, or amend the acts providing for a National currency, the assessors in townships, towns and cities, should assess these shares in conformity with such new legislation, but not at a greater rate than is imposed upon other moneyed capital in the hands of individuals in this State.

The second section declares that if Congress should change, alter, or amend the acts providing for a National currency, the assessors in townships, towns and cities, should assess the shares in conformity with such new legislation, but not at a greater rate than is imposed upon other moneyed capital, etc. The act of April 3, 1866 (and which was construed in the *Hubbard* case), and all other acts and parts of acts inconsistent, etc., are repealed.

There is no difference of opinion upon the proposition that all property should be equally taxed, or as to the meaning and scope of the statute which declares that all property (aside from certain specified articles), real and personal, within the State, is subject to taxation. Rev., § 712. But we held in the previous cases, following the decision of the Federal courts, that taxation of the *capital* was

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not the taxation of the shares of these banks. And it was held (under section 1598 of the Revision), that the tax was to be upon the *capital* of banks *organized within the State*, and not upon the *shares*, and that as a consequence, under the act of Congress the Legislature could not, by the act of 1866 (April 3), tax these *shares* in National banks. But for this provision, I am not mistaken in saying that the taxation would have been sustained. For it is expressly provided that stock or shares in any corporation or company, not required by law to be otherwise taxed, shall be liable to taxation.

It was held that by section 1598, stock in banking corporations was to be *otherwise* listed and taxed, to be taxed through the *capital*, and hence not by the shares, as in other cases. It was also held that it might be competent for the State, in granting a franchise, to affix as conditions of the grant, that *shares* and *capital* of the company should be subject to taxation, but that this should not be allowed, lest double taxation might ensue, unless this was the clearly expressed intention of the statute. This intention, in our opinion, did not appear, and hence, as the *capital* was to be taxed, the *shares* should not be. And yet nothing was clearer than that if there had been no provision for the taxation of the *capital* of banking associations, thus placing such companies upon a peculiar and distinct ground, the right under the general law to tax the *shares* would be undeniable, and from the conclusion that the *shares in National banks* would have hence been taxable, there would have been no escape.

Does the act of 1868 then make the matter any better for the taxing power? It repeals all acts and parts of acts *inconsistent* with its provisions. The law of 1866 had just been declared ineffectual to accomplish the purpose designed.

As we have seen, but for section 1598 (being a part of section 11 of the "General Banking Act" of this State) the unquestioned legislative intent could have been carried out. We then inquire, does not this obstacle still remain? It seems to me not. The law of 1868 provides for the taxation of the *shares* of National banks.

This is allowed by the 41st section of the act of Congress of June 3, 1864, and it is not pretended that there is any thing in the act of February 8, denying or making less manifest or certain this right. Our law (of 1868, p. 213) provides for their taxation like other moneyed capital in the hands of individuals, and hence,

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under the general law, like shares in other banks and corporations. Section 1598 is *inconsistent* with these provisions, in conflict with the declared will of the Legislature upon this subject, a will declared after a construction of the prior statute, and designed to remove the obstacle pointed out, and, if *inconsistent*, is declared *repealed*, and hence, must be so regarded. In view of all the legislation, general and special, upon the subject, the policy of the law that all property should bear its just and due proportion of the public burden, it seems to me there can be no fair escape from this conclusion.

This view is strengthened by some other considerations. A grave doubt might arise whether this repeal was intended, if after such repeal there remained no law for the taxation of shares in banks organized under our general law. We have already seen, however, that these can be reached under the General Revenue Law. Then, again, we know there is not, if there ever was, in the State a bank organized under this law.

This thought is quite material, as indicating the actual condition of things in the State, and the absence of objection to the legislative comprehension in passing the repealing clause. For it could well be reasoned: "There has never been a bank under this law—or if any, certainly none now—if now or hereafter, then, this section out of the way, the shares therein can be taxed like shares in other corporations. This section is the obstacle in the way of making these shares in National banks meet their just proportions of the public taxes, as just declared by the highest judicial tribunal of the State, and hence, by repealing '*all acts and parts of acts inconsistent with this act*,' we leave the way clear and unobstructed." If this is not so, then it is difficult to see why they should re-enact the law of 1866, as was done, so far as the first section was concerned, it being *the section* making the shares liable to taxation.

Then, to look at another thought. There was no difficulty under the congressional legislation as to the right of the State to subject this property to taxation. As to the intention and purpose of our own Legislature there can be no doubt. And hence it will be seen, that by the second section of the act under consideration, the assessors were given the power to assess these shares, in conformity to any change in congressional legislation.

What could more clearly show the intention and purpose to tax

these shares, and to remove the last obstacle, if possible, in the way of such intent? It has been declared that with section 1598 in force, there could be no taxation. This continued, the way was effectually hedged up. To confer this power upon the assessors, and yet leave the law so that there could be no taxation, as the Federal legislation then stood, or to suppose that it was only to have prospective force, is most unreasonable. It is our duty to give the law force and effect, if we can. It repeals any thing in the way of or inconsistent with its operation. If this property is to escape taxation, the right ought to rest upon some clear and just ground.

The Legislature having declared its liability, courts are not justified in indulging in nice distinctions, in defeating this will. The way is, to our mind, clearer, plainer, better sustained by reason and in principle to uphold than to defeat the legislative will, and hence we hold this property liable to taxation.

Before passing to another point made in this connection, it is proper to say that the case is ruled up on our *State legislation*, without reaching the argument drawn from the recent legislation of Congress, and quoted in the commencement of this opinion (proviso to act of Feb. 10, 1868). That statute is certainly not in conflict with the result here reached. It does not in any way lessen or take from the States the power to tax these shares. And there is, to say the least of it, much plausibility in the proposition that this act grew out of the adjudication in the State and Federal courts, and the apparent and indeed actual difficulty in every instance, of so framing the legislation as to carry out the rule of Congress (under the proviso of the 41st section of the act of 1864), and reach a large amount of property which was regarded as escaping its just proportion of the public burden. And therefore the act of 1868 leaves the States to determine the *manner and place of taxing the shares* of National banks.

It is sufficient for us, however, without getting into this argument or expressing an opinion thereon, to say that the recent act is not in conflict with the power to tax under our law as it now stands. It sustains rather than denies the right.

[The court then passed upon a question of Constitutional Law, not relating to the subject of this volume.]

All the judges concurring, it is ordered that the first and second causes be reversed and the others affirmed.

*Judgments accordingly.*



## FIRST NATIONAL BANK V. HERSHIRE.

(31 Iowa, 18.)

*Taxation of National bank shares — Seizure of bank property.*

A collector of taxes has no authority to seize the property of a National bank to satisfy a tax assessed against a shareholder.\*

REPLEVIN to recover a package of bank bills belonging to plaintiff, a National bank, which defendant, the treasurer of Johnson county, had seized to satisfy a tax assessed upon the shareholders of such bank. Plaintiff had judgment and defendant appealed.

*Gaston & Williams* and *Robertson & Patterson*, for appellants.

*Edmonds & Ransom*, for appellees.

DAY, Ch. J. Whether, under the provisions of chapter 153, Laws Twelfth General Assembly, banks organized in this State pursuant to provisions of acts of Congress, are liable absolutely for the payment of taxes assessed upon the shares of stockholders, or only when it is shown that dividends have been declared in favor of the shareholders, is a question upon which the court, as now advised, is not agreed. And, as its consideration is not necessary to a determination of the case, we waive its consideration for the present. We unite in the opinion that the treasurer was not authorized to *seize* the property of the bank for the tax.

The tax, under the law, must be assessed against the shareholder. Section 756 of the Revision makes it the duty of every person subject to taxation to attend at the office of the treasurer and pay his taxes, and provides that, if he neglects to pay them before the first day of February following the levy of the tax, the treasurer shall make the same by distress and sale of his personal property, and the tax list is made a sufficient warrant for such distress.

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\* See *National Bank v. Commonwealth*, ante, p. 34, and *First National Bank v. Douglas County*, ante, p. 268, wherein it was held that the property of the bank could be distrained to pay the tax.

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Leach v. Hale.

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An assessment against a shareholder, however, does not authorize the seizure of the property of the bank for its liquidation. If the bank is liable for the payment of the tax, the liability is to be enforced by ordinary process of law.

For the reason that there was no authority for *seizing* the property of the bank, the judgment of the General Term is

*Affirmed.*

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LEACH v. HALE, Receiver, appellant.

(31 Iowa, 69.)

*National banks—Powers of—Right of, to exchange securities.*

Where a National bank received on deposit United States bonds of one class for the purpose of converting the same into bonds of another class, *held*, (1) that the bank was not a mere mandatary or bailee acting without compensation, but was liable to the depositor for the value of the bonds on its refusal to deliver them on demand; (2) that the business of receiving one class of United States bonds, to be converted into another, is within the scope of the powers conferred upon National banks by the act of Congress under which they are organized;\* (3) that where a certificate of deposit is inadmissible as evidence for want of a proper stamp, parol evidence is admissible of the facts it recites.

THE plaintiff avers in his petition that he deposited in the First National Bank of Keokuk \$400 in 7-30 United States bonds, to be converted into 5-20 six per cent United States securities; that such bonds were at a premium of ten per cent, and worth \$440; that a demand was made of the receiver of the bank for the return of one of the other class of bonds, which was refused; and that the conversion of United States bonds from one class into another was a part of the legal business of the bank from which it derived profit. A written receipt, executed by the cashier of the bank, was annexed to, and made a part of, this petition.

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\* See *Van Leuwen v. First National Bank* (54 N. Y. 671), *post*, but which was said in *First National Bank v. Ocean National Bank* (60 N. Y. 278), *post*, decided "no general principle"; *Wiley v. First National Bank* (47 Vt. 546), *post*; *Weckler v. First National Bank* (42 Md. 58), *post*; *Fowler v. Scully* (72 Penn. St. 456), *post*; *First National Bank v. Pearson*, *post*.

An amended petition was subsequently filed reciting substantially the same facts, but making no reference to the receipt above mentioned.

The answer denies the allegations of the petition, and that the bonds were ever a part of the assets of the bank, or were ever appropriated or converted to its use.

Trial by the court, and judgment for plaintiff.

Among the facts found by the court were the following

1. The First National Bank of Keokuk was an association under the laws of the United States, doing a general banking business at the date the bonds in question were received by it.

2. That about that time its cashier advertised in a newspaper, published in Keokuk, that it would convert 7-30 United States securities into bonds called 5-20's without charge.

3. That at that time it was the custom of banks at Keokuk to convert one class of United States bonds into another as a part of their general business.

4. That plaintiff left with the cashier of the bank \$400 in United States bonds, to be converted into bonds of another class.

5. That the cashier of the bank executed a receipt for said bonds set out in plaintiff's petition.

6. That, while the bank advertised that it would convert United States securities without charge, it was in some form compensated therefor.

Motion by defendant in arrest of judgment and for a new trial on the following grounds: 1. The petition does not state a cause of action. 2. The facts set out show a tort if any thing, and the cause of action set out in the petition is *ex contractu*. 3. The decision of the court is not sustained by the evidence and is contrary to law. 4. The facts found are not supported by the evidence. Motions overruled, and judgment for plaintiff. Defendant appeals.

R. P. Lowe, for appellant.

W. B. Collins, for appellee.

BECK, J. We will notice the objections made by defendant's counsel in the order they are discussed in the printed argument. The first point presented for our consideration is this one: The transaction, which is the foundation of the action, amounts in law to a bailment and not to an indebtedness or promise to pay money.

The petition claims recovery as upon an indebtedness or promise to pay money ; judgment, therefore, cannot be rendered thereon. In support of his views defendant's counsel argues that, from the evidence, it appears that plaintiff deposited certain bonds with the cashier of the bank to be exchanged for other bonds, and that this service was to be rendered by the bank without compensation. He concludes that the transaction is a bailment in the nature of a mandate. In considering this question we will look to the findings of the court to determine the nature of the transaction. The question, whether the findings are supported by the evidence, will be hereafter considered in passing upon the objections made to them by defendant. We will also concede that the transaction was within the scope of the bank's business, and that it had power to receive and convert the bonds of plaintiff. This is denied by defendant and a question raised thereon, which we will consider in its order.

The transaction, in the light we are now considering it, amounts to the deposit of certain securities with an undertaking to return those of a different class, and was within the scope of the general business of the bank. The court made no finding as to the fact whether the bank received, in this particular case, compensation, though it is found that generally for such business it was in some form compensated. As to the liability of the bank the transaction is governed by the same rules which would apply in the case of the deposit of money to be repaid in different currency, or the receipt by the institution of commercial paper for collection. Can it be claimed that the deposit of a draft in bank, under a special agreement that it shall be collected and the proceeds paid in gold or United States securities, creates a bailment in the nature of a mandate ? We are unable to see any distinction between a transaction of that kind and the one before us. If no agreement was made for the payment of compensation to the bank, or if it was agreed that none should be paid, in neither case is its liability different from the case of deposits of money securities or commercial paper for purposes within the limits of its general business. Institutions of this kind, in dealing in such property, are compensated for their services by direct benefits to their business. It would startle the financial and commercial world to announce the rule contended for by defendant's counsel, that banks receiving securities from their customers for a purpose within the limits of

their proper business, even without compensation, are liable only as mandatary?

In our opinion the bank's liability on account of the transaction, as it appears from the court's findings, is sufficiently set out in the petition, and judgment was correctly rendered thereon.

It is next claimed that the transaction in question is not within the range of banking business authorized by the act of Congress under which the institution exists. The act referred to confers upon National banks organized under its provisions authority to exercise "all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money upon personal security; by obtaining, issuing and circulating notes according to the provisions of this act." It is argued that the business of receiving from the customers of the bank one class of United States bonds to be converted into another is not within the scope of the powers conferred by this act. We are not informed by the record as to the acts that were necessary to have been done by the bank in order to "convert" bonds of the government from one class to another. It may have been done by forwarding the bonds to be converted to the proper officer of the government, and receiving from him in return their equivalent in a different series; or it may have been accomplished by their sale and the purchase of the kind desired. We think the bank, under the provisions of the act above cited, was clothed with authority to pursue either course in order to "convert" the bonds of its customers. It was authorized to receive deposits. It cannot be doubted that it might have received deposits of United States bonds, and certainly such deposits could have been received under a contract to return bonds of another class in their place. It was empowered to purchase and sell such bonds, and, undoubtedly, it was within the limits of its power to sell plaintiff's bonds when deposited with it and buy others to be returned in their place. We are unable to see why these transactions may not have taken place with the proper officer of the government, the bank delivering to him one class of bonds and receiving in return another. It is the policy of the government to encourage the purchase and sale of its bonds and to facilitate transactions in them, for thereby their value will be enhanced and the credit of the government in a meas-

ure promoted. It is not probable that Congress intended to impose restrictions upon the National banks, the most numerous class of financial agents in the country, which would operate to prohibit dealing in the securities of the government in a manner usual among bankers and banking institutions. The effect of such legislation, it is apparent, would tend to discourage transactions in these securities, and in a measure operate to lessen their value.

The receipt given by the cashier of the bank, it is claimed, is not sufficiently stamped and was, therefore, improperly admitted in evidence. The record recites, that when offered in evidence, objection was made to its admission on account of the want of a stamp; that it was received subject to the objection, which was to be afterward passed upon. No further mention is made in regard to the objection, nor is it stated what ruling was made thereon. Neither does it appear that the court based its finding of the fact of the delivery of the bonds to the cashier of the bank upon the receipt. There was other evidence before the court competent to establish the transaction. Parol evidence is admissible for that purpose. The petition does not claim recovery upon the receipt; it is not set up as the foundation of the action, but is referred to as evidence of the fact of the delivery of the bonds and failure to return them by the bank. Admitting that the receipt is not competent, the facts it recites are sufficiently established by other evidence. Its admission, if it was considered as evidence, was, therefore, error without prejudice.

It may be conceded that the contract between the plaintiff and the bank is embodied in the receipt, yet, if it is void, that contract may be proved by parol evidence. *McAfferty v. Hale*, 24 Iowa, 356. Such evidence was properly admitted under the pleadings.

It is finally objected that the findings of the court are contrary to the evidence. We have given the evidence careful consideration and are of the opinion that the conclusions of the court are well sustained.

The judgment of the court is

*Affirmed.*

## HALE v. WALKER, appellant.

(31 Iowa, 344.)

*National banks — Transfer of stock — Liability of transferee.*

A person who appears upon the books of a National bank as the legal owner of shares of its stock is, upon the failure of such bank, liable for the debts of the association to the extent of the shares held by him, although he received and holds such shares as collateral security for a loan to a shareholder.\*

**A**CTION by a receiver of an insolvent National bank against a shareholder to enforce the individual liability of such shareholder for the debts of the association, according to the provision of section 12 of the National Banking Act.

On the 28th day of December, 1868, the plaintiff, Hale, filed a petition in the Van Buren District Court, in which he alleged his appointment as receiver of the First National Bank of Keokuk, organized under the Currency Act of Congress, of Feb. 25, 1863 ; the refusal of the bank to pay its circulating notes and other liabilities ; the absence of available assets to pay over fifty per cent of the liabilities of the bank — the necessity for him as receiver to enforce the individual liability of the stockholders — and that, at the time of the failure of the bank, the defendant, Joel Walker, was the transferee of H. K. Love, and owner of fifty shares of stock of \$100 each, in said bank, amounting to \$5,000, as appears from the stock-books of said bank. The plaintiff asks judgment for \$5,000 with interest.

The following exhibit is annexed to the petition :

“ Copy from the stock-books of the bank. Dr. — Joel Walker, May 24, 1866, fifty shares, paid \$5,000. Cr. — May 28, 1866, paid up, \$5,000.”

On the 15th day of January, 1869, the defendant filed his answer to this petition, in which he denies “that at the time the said banking association closed its doors, and failed to redeem its circulation and pay its liabilities, the said Joel Walker became the owner (as the transferee of H. K. Love, or otherwise) of fifty shares of stock of \$100 each in said bank, amounting to \$5,000 ; and as

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\* See *Wheelock v. Kost*, ante, p. 406 ; *Magruder v. Colston* (44 Md. 349), post.

to all the foregoing averments of the petition not herein specifically denied, which defendant neither admits nor denies, he calls for strict proof."

And by way of further answer he shows that on June 21, 1865, this defendant was the owner of the following described United States bonds, viz.: of bonds known as 10-40 bonds, \$2,000, and of 7-30 bonds, \$3,000; that one H. K. Love, being then and there the president of said banking association (and so remaining until on and after February 21, 1868), being desirous of procuring the loan and use of said bonds, either for himself or otherwise, borrowed the same of this defendant, giving defendant as security therefor a pledge of certain shares of stock in said banking association, as will fully appear by the agreement, of date June 21, 1865, of which a copy is hereto attached, marked "Exhibit A," and made part of this answer.

That afterward, to wit, on or about May 24, 1866, the said Love (still acting as, and being president of said bank as aforesaid), representing that the aforesaid agreement and pledge of bank stock was not in as reliable and perfect a shape and condition as would be desirable for the interest of defendant, so as to make him the unqualified pledgee of said bank stock, and informing defendant that to make said pledge secure and reliable, its transfer on the books of said bank, as said pledge, would be desirable if not necessary, induced defendant to surrender said agreement and pledge as shown by "Exhibit A," and thereupon executed to defendant, instead thereof, a new mortgage or pledge thereof, a copy of which is hereto attached, marked "Exhibit B," and made part hereof. And he shows that in the execution of said agreement it was fully and explicitly understood between said Love and this defendant, that the defendant, under said agreement, continued to hold said stock only as the pledgee or mortgagee thereof, and not otherwise; that in no intendment was he to be held or construed as a purchaser or owner thereof, or as a shareholder of said banking association; that in all said matters this defendant acted under and relied upon the representation of the said Love; that the defendant was ignorant of and unskilled in transactions of this nature, and knowing said Love to be the president of said bank, constant in his attendance thereon, and fully qualified by experience as a banker, trusted implicitly to the representation by him then and there made, as to the nature and effect of said written agreement; and he avers and is



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ready to show that if, by any construction or intendment of law, the said instrument, or any part of the same, shall seem to hold this defendant to be a purchaser, and not a mortgagee of said stock, then said instrument so set forth, which was then and there written by the said Love, was either false or fraudulently so written, or so done by mistake, as the whole tenor and purport of said agreement fully shows, and therefore, should be corrected and reformed so as to correctly agree with the intention of the defendant and the representations and agreements of said Love, as made at the time and with the evident purport and intention of said instrument taken as a whole.

The defendant prays that the cause may be transferred to the equity side of the court, that a decree may be entered reforming the contract as set out in Exhibit "B," so that the same may be conformable to the real intent and purpose of the parties, etc.

The following is Exhibit "A" referred to in the answer:

"First National Bank of Keokuk, Iowa, No. 46, fifty shares. Be it known that H. K. Love is the proprietor of fifty shares of the capital stock of the First National Bank of Keokuk, on which \$100 per share have been paid, and which is transferable only on the books of the association by him or his attorney, on surrender of this certificate :

"KEOKUK, June 21, 1865."

"H. K. LOVE, President.

"Joel Walker has deposited with me \$2,000 in United States 10-40 bonds, and \$3,000 in United States 7-30 bonds, with semi-annual coupons attached, which I agree to return to him or his order on the 15th day of August, 1867. For the use of said bonds I agree to collect the interest and pay it over to said Walker without charge. As security for the safe return of said bonds, I have placed in the hands of said Walker share No. 46 of the First National Bank of Keokuk, Iowa, calling for fifty shares of the stock of said bank, which is to be returned to me with this certificate when the above United States bonds will be returned to him.

"H. K. LOVE.

"KEOKUK, June 21, 1865."

The following is exhibit "B," referred to in the answer :

"This agreement between Joel Walker and H. K. Love, witnesseth : that the said Walker has this day purchased of the said Love fifty shares of the First National Bank of Keokuk, for which he has paid the said Love in United States 10-40 bonds \$2,000, and 7-30 bonds \$3,000 ; the said stock will appear upon the books of said bank and certificate No. 46, in the name of said Walker, for fifty shares, amounting to \$5,000.

"Now, therefore, said H. K. Love hereby agrees to guaranty to said Walker semi-annual dividends upon said bank stock, at the rate of 7-30 per cent per an-

num in currency on \$3,000, and 5 per cent per annum in specie on \$2,000, free from all taxes, said dividends to be due and payable to said Walker on the 15th of August and 15th of February each year. And in consideration of said guaranty the said Love is to have and receive all said bank stock has made, or may hereafter make, over and above 7-30 per cent, and 5 per cent per annum, as above specified. And said Walker hereby assigns to said Love all the earnings of said bank stock over and above 7-30 per cent and 5 per cent per annum, as aforesaid. And said bank is hereby authorized and directed to pay over the same to said Love or his order.

"This agreement, unless extended by mutual consent, will terminate on the 15th day of August, 1867, at which time said Walker is to make over and transfer to said Love the certificate No. 46, calling for fifty shares of stock of the First National Bank of Keokuk, and said Love is to return to him, in full payment for the same, \$2,000 in United States 10-40 bonds, and \$3,000 in United States 7-30 bonds; whereupon the certificate No. 46, above referred to, will be the property of said Love, and the stock will be transferred upon the books of said bank to him. Witness our hands this 24th day of May, 1866.

"JOEL WALKER,

"H. K. LOVE."

"\* \* \* The time on the within contract is extended to February 15, 1868, at which time the whole \$5,000 is to be paid (without notice) in 5-20 bonds, and interest at the rate of 7-30 in currency per annum.

"H. K. LOVE,

"JOEL WALKER."

"August 14, 1867.

The plaintiff demurred to this answer on the ground of want of equity. Demurrer sustained and defendant appeals.

*H. H. Trimble*, for appellant.

*R. P. Lowe*, for appellee.

DAY, C. J. In section 12 of the act to provide a National currency, "it is enacted that the capital stock of any association formed under the act shall be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of the association; and that every person becoming a shareholder by such transfer shall, in proportion to his shares, succeed to all the rights and liabilities of the prior holder of such shares; and that the shareholders of each association formed under the provisions of the act shall be held individually responsible for all contracts, debts, and engagements of such association to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

The petition avers "that, at the time said bank closed its doors

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and refused to pay its liabilities, the defendant, Joel Walker, was the transferee of H. K. Love, and owner of fifty shares of stock of \$100 each in said bank, \* \* as will fully appear from the stock books in said bank." A careful scrutiny of the answer of defendant shows that he does not deny the allegation that he is the transferee upon the books of the bank of H. K. Love. In one paragraph of the answer he "denies that at the time the said banking association closed its door and failed to redeem its circulation and pay its liabilities, *that the said Joel Walker became the owner* (as the transferee of H. K. Love, or otherwise) of fifty shares of stock of \$100 each in said bank." The statement in the petition that Joel Walker "*was the owner of fifty shares of stock*" is the mere legal conclusion of the pleader, from the averment of the fact that he was the transferee of H. K. Love. This conclusion of law, but not the averment of fact, the defendant denies.

The agreement referred to in the answer as exhibit "B" states "that the said Walker has this day *purchased* of the said Love fifty shares of the First National Bank of Keokuk," and stipulates that "*the said stock will appear upon the books of said bank and certificate No. 46, in the name of said Walker, for fifty shares amounting to \$5,000.*"

It is quite apparent, from the entire answer, that the fact of transfer is conceded, and that the defendant relies for immunity upon the fact that the transfer was made as security to defendant for a loan to H. K. Love. The question thus presented upon the record, though a new one here, has been the subject of judicial determination in some of the sister States. In the case of *Creese et al. v. Babcock et al.*, 10 Metc. 525, it was held, under a statute containing provisions as to the liability of a shareholder, substantially the same as those of the one under consideration, that the holder of stock at the time of the dissolution of the charter, although he held the shares as collateral security, or as trustee for other persons, was individually responsible for the debt of the corporation. This doctrine was re-affirmed in the same court in the case of *Grew v. Breed et al.*, 10 Metc. 569, in which it was held, that those who hold stock as collateral security, and those who hold it in trust, whether the trust *does* or does not appear on the books of the bank, are liable for the payment and redemption of unpaid bills.

In *Adderly v. Storm*, 6 Hill, 624, it was held, that the transferee of shares of stock, as collateral security, was liable for a debt of the

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corporation contracted after the debt, as security for which the transfer was made, had been paid, and after a power of attorney had been given to make a re-transfer, but before such re-transfer was executed. In *Rosevelt v. Brown*, 11 N. Y. 148, the case of *Adderly v. Storm* was cited and approved, and the liability of the holder of stock as collateral security re-affirmed.

In the matter of *The Empire City Bank*, 18 N. Y. 199, the same doctrine was announced. We have been referred to no adjudication at variance with these cases.

Counsel for appellant concede their correctness, but claim that they are not applicable to this case. We are unable to distinguish them in principle from the case under consideration. In *Crees et al. v. Babcock et al.* a plea and answer strikingly similar to the answer in this case were held to constitute no defense. The doctrine of these cases will doubtless work a hardship in some instances; yet this hardship is *particular* while that of the converse doctrine would be *general*. As was said in *Adderly v. Storm*, "if we depart from the terms of the law, and inquire into the equities which may exist between the stockholder and some third person, it cannot fail to embarrass creditors in seeking a remedy for the wrongs which may be done by the corporation. If creditors must look beyond the legal title they can never know against whom to proceed."

[The remainder of the opinion disposes of a question of practice.]

*Judgment affirmed.*

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HERSHIRE V. THE FIRST NATIONAL BANK.

(35 Iowa, 272.)

*Taxation of shares — Payment of tax by bank.*

Under the statute of Iowa a National bank is not liable for the tax assessed against a shareholder unless it have in its possession dividends or property belonging to such shareholder. *National Bank v. Commonwealth*, ante, p. 34, distinguished.

**A**CTION by Hershire, treasurer of Johnson county, against the First National Bank of Iowa City to recover about \$2,000 of taxes, interest and penalty, for the years 1868 and 1869, due

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upon certain shares of the capital stock of said bank, owned by different non-resident persons whose names are given. There was a demurrer to the petition, by the defendant, which was sustained by the court. The plaintiff appeals.

*Clark & Haddock* and *Robinson & Patterson*, for appellant.

*Edmonds & Ransom*, for appellee.

COLE, J. The averments of the petition are, substantially, that the plaintiff Hershire is treasurer of the plaintiff Johnson county, which is a municipal corporation under the laws of Iowa; that the defendant is a banking corporation duly organized under the acts of Congress to provide a National currency, and doing business in Iowa City, and was so doing business in 1868 and 1869; that sundry shares of the capital stock, aggregating in value \$23,000, were held and owned in those years by divers persons (the name and amount held by each being stated, and most of such persons being non-residents of the State); that the said shares while so held and owned were legally listed and assessed for taxation; that the taxes, interest and penalty now due thereon amount to \$2,000; that said persons had neglected or refused to pay the same or any part thereof, and by virtue of the statute in such case made and provided, plaintiffs are entitled to demand and recover the same from the defendant, but the defendant has utterly failed and refused to pay the same or any part thereof. Wherefore plaintiffs ask judgment, etc.

The demurrer by the defendant to this petition was because:

1. There is a misjoinder of parties.
2. Neither party can bring the suit, nor is there a cause of action set forth in the petition.
3. The exclusive method of collecting taxes is pointed out by statute, and no other can be resorted to.
4. There is no averment in the petition that defendant has any dividends or other property of the taxed shareholders named, or ever had, from which the tax could be paid.
5. There is no tax claimed to have been levied on defendant, but only a tax against individual shareholders; and defendant cannot be made to pay it, unless defendant has dividends or property of such shareholders, and there is no averment in the petition to that effect.
6. The plaintiffs are not the legal parties in interest, and no debt is shown against the defendant.

This demurrer was sustained; and this ruling is assigned as error.

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It is only necessary for us to consider the grounds specified in the fourth and fifth divisions of the demurrer. That is to say, if an action at law can be maintained for taxes due, and the plaintiffs are the proper parties to bring such action (and we express no opinion upon either), whether it is necessary in this case to aver that the defendant has dividends or other property of the delinquent shareholders in its possession or under its control, in order to state a cause of action against the defendants.

The act of Congress under which the defendant was organized provides :

"SEC. 40. That the president and cashier of every such association shall cause to be kept a correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, and such list shall be open to the inspection of the officers authorized to collect taxes under State authority."

The next section enacts that the tax upon the shares, imposed under the State laws, shall not exceed the rates imposed upon the shares of any of the banks organized under the authority of the State where such association is located. In providing for the taxation of the shares in banking associations, pursuant to the act of Congress, our statute enacts:

"That it shall be the duty of the principal accounting officer of each of said associations on or before the 1st day of May, 1868, and between the 1st and 15th days of January of each year thereafter, to list the shares of the association, giving the assessor the name of each person owning shares and the amounts owned by each ; and for the purpose of securing the taxes assessed upon said shares, each banking association shall be liable to pay the same as the agent of each of its shareholders, under the provisions of section 725 of the Revision of 1860 ; and it shall be the duty of the association to retain so much of any dividend or dividends belonging to any shareholder as shall be necessary to pay any taxes levied upon his or her shares." Laws of 1868, chap. 153, 2.

The following is a copy of the Revision of 1860:

"SEC. 725. Any person acting as the agent of another, and having in his possession, or under his control or management, any money, credits, assets or personal property, belonging to such other person, with a view of investing or loaning, or in any other manner using the same for pecuniary profit, shall be required to list the same at the real value, and such agent shall be personally liable for the tax on the same, and if he refuse to render the list or swear to the same, the amount of such money, property, notes or credits, may be listed and valued according to the best knowledge and judgment of the assessor, subject to the provisions of section 25 of this act."

It will be observed upon the bare reading of our statute, that it does not, like the Kentucky statute, involved and construed in *National Bank v. Commonwealth*, 9 Wall. 353 (*ante*, p. 34), make the banking association directly liable for the taxes levied upon the shares. But our statute only makes the banking association liable to pay the taxes on such shares as the agent of the shareholders, the same as other agents are liable under the provisions of section 725 for taxes upon property under their control for investing, etc.; and our statute also devolves the further duty, upon the banking associations, of retaining sufficient of the dividends to pay the taxes.

Now, since other agents are only liable under the provisions of section 725, for taxes upon money, property, etc., *under their control* with a view of investing, loaning or otherwise using for pecuniary profit, it would seem necessarily to follow that the banking association could only be made liable, when it had the money, property or credits of its shareholders *under its control*, or when it retained or failed to retain dividends. In other words, the liability of the bank for the tax of its shareholders will arise, when the liability of an agent for the tax of his principal will arise; and the liability of neither can arise except upon the fact that there is money, property or credits under the control of the bank or agent. Hence this fact must be averred in order to state a cause of action.

The shares in the capital stock of the banking association are the property, and under the control of the shareholders. They are not under the control or management of the banking association in any legitimate sense. Even if it be granted that the rules or by-laws of every banking association require, that in order to constitute a valid and complete transfer of such shares the same must be entered upon the stock-book of the association, yet this could not limit or restrain the absolute power of sale and alienation by the shareholder himself, and doubtless, any refusal to enter such transfer upon the stock-book might be overruled, and corrected by mandamus or other proper remedy. Of course, we are not here questioning or discussing the right of the banking association to retain the dividend for the purpose of paying the taxes, or of providing by rule or by-law, properly made and recorded, for the liability of the shares themselves for any indebtedness of the shareholder to the bank or the like, so that any transfer of such shares could not affect the right of the bank as against a purchaser hav-

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ing notice of such by-law. All that we here intend to say is, that the shareholder himself in legal contemplation owns, controls, and manages his own shares, nothing different in fact being shown. And hence, the banking association is not liable for the tax due from shareholders, under our statute, simply because they are holders of shares in the capital stock of such banking association. Other averment and showing must be made that the shares are in fact under the control or management of the association, before it can be made liable.

If there have been dividends, then it is made expressly the duty of the bank to retain them, or sufficient of them, to pay the taxes. And if it should appear that the bank had made no dividends, but might have done so, and instead thereof, placed its earnings and profits to its assets as surplus, such surplus might possibly be held to be money, credits, assets or personal property belonging to the shareholders and under the control of the banks, and hence make it liable to that extent for the taxes due from its shareholders. In brief, our view of the statute is, that it effectuates a statutory garnishment of the bank, to secure the payment of the taxes due from its shareholders. To make it liable it must be shown that the bank now has or has had dividends or other money or property belonging to the delinquent shareholder. Whereas, the Kentucky statute makes the bank liable absolutely for the taxes upon shares. If that is better than ours, it is for the Legislature, and not for us, to enact it here.

*Affirmed.*

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FIRST NATIONAL BANK V. HAIRE.

(36 Iowa, 443.)

*When National bank may take mortgage on real estate.*

A National bank loaned money upon a note made by one member of a firm to another, and indorsed by the latter to the bank. The maker, when the note was made, gave the indorser a bond and mortgage on real estate to secure him against loss, and it was agreed between the parties and the bank that in case of default the security should inure to the bank. *Held*, that the bond and mortgage were not within the provision of the National Banking Act



forbidding National banks purchasing real estate, and that they were legal and binding and could be enforced by the bank.\*

**A**CTION to foreclose a mortgage. The opinion states the case.

*Polk, Hubbell & Goode and Galusha Parsons*, for appellants.

*W. H. Johnson pro se, Duncombe & Springer*, for appellee.

COLE, J. Under the issues made by the pleadings as amended, the following facts are proved: In 1856 John Haire began a general mercantile business in Ft. Dodge, with the funds and in the name of his wife, Mary M. Haire, he acting as her agent; and continued it till November 1st, 1866, when a partnership was formed between Mary M. Haire and John H. Taafe, under the name of Haire & Co., by whom the business was continued, John Haire acting in the new firm business, for and on behalf of his wife. By the terms of partnership, each was to furnish \$4,000 capital. Taafe furnished his in cash at once; but Mrs. Haire then only furnished the stock of goods on hand, worth, as agreed, \$1,530. While Mrs. Haire was doing business alone she acquired the title to lots 4 and 5, in block 23 of Ft. Dodge, and upon the former she had erected a storehouse and residence used as a homestead.

On the 25th of January, 1869, the firm of Haire & Co. was largely indebted, but was in good credit and was supposed to be solvent. The firm desired to borrow of plaintiff \$5,000, which plaintiff was unwilling to loan, on the bare credit of the firm. It was then agreed between all the parties, that since Mrs. Haire had not paid up all her capital stock to the firm, the firm of Haire & Co. should execute two notes for \$2,500 each, payable to the order of John H. Taafe at the plaintiff's bank, sixty days after date; that Taafe should indorse the same to plaintiff; and further, that the said Mary M. and John Haire should execute a bond in the sum of \$10,000 to Taafe to secure him on account of such indorsements, and the renewals thereof for one year, and should also execute to Taafe a mortgage upon the said two lots to secure the performance of the conditions of said bond, and with the distinct understanding that in case said parties failed to pay the notes, this

\* See *Kansas Valley National Bank v. Rowell*, ante, p. 264, and cases referred to in note.

security should inure to the benefit of the plaintiff. The papers were all duly executed accordingly, and the plaintiff discounted the notes and placed the proceeds to the credit of the firm on the books of the bank with which the firm had theretofore been doing business. The proceeds were used in paying the debts of the firm, \$1,016 of which was to the bank on a note then due, and a part of the balance was used in paying debts to merchants, then in the bank for collection.

The notes were afterward renewed in April and in September, but the renewals were made in the name of Mary M. Haire, and indorsed by Haire & Co., and by Taafe; no part of either has ever been paid. A power of attorney of same date as the bond was executed by Taafe to E. G. Morgan, who was a cashier in the bank, authorizing him to assign the bond and mortgage; and the bond was also indorsed, in blank, by J. H. Taafe. The bond and mortgage came to the possession of the plaintiff about the time of the first renewal, but the assignment, by the attorney in fact, was not written out or signed till January 6, 1870.

In October, 1869, a difference arose between the members of the firm of Haire & Co., and each commenced a suit against the other to close up and settle the partnership; these suits were consolidated and a receiver of partnership effects was appointed and had made considerable progress in the settlement of the affairs, when, and on the 21st day of February, 1870, a petition in bankruptcy was filed in the U. S. District Court for Iowa, by creditors against the firm of Haire & Co. The firm and Taafe were adjudged bankrupts; but, on demurrer, the proceeding as to Mrs. Haire was dismissed on the ground that she was a married woman. The effects of the firm and of Taafe were transferred to assignee by deed of date June 8, 1870.

Prior to bringing this action, the plaintiff commenced a like action in the Circuit Court; the defendants demurred to the petition; the demurrer was argued, and pending its consideration, the plaintiff entered a dismissal of the action in the clerk's office; no further proceedings have ever been had in it, and both parties have treated it as dismissed.

[The court here decided some questions of practice.]

III. *As to the right of the plaintiff, upon general equity principles, to the benefit of the bond and mortgage executed by Haire and husband to Taafe.* It will be remembered that the execution of

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this bond and mortgage by Mrs. Haire and her husband, to Taafe, as the indorser of the notes, was the condition upon which the plaintiff would loan the money, or discount the notes; and the bond and mortgage were executed for the express purpose of increasing the security by enhancing the value of Taafe's indorsement. Upon the faith of this enhanced value, Mrs. Haire, for the benefit of herself individually and of the firm of which she was a member, obtained the loan of the plaintiff. To allow her now to set up matters between herself and Taafe, to defeat the mortgage and the purpose of its execution, would be violative of the plainest principles of equity. The facts create an equitable estoppel in behalf of plaintiff as against Mrs. Haire.

IV. *As to the effect of the limitation of the plaintiff's powers, by the act of Congress creating National banks.* By that act it is provided in section 8, that such banks shall have power to loan money *on personal security*. Section 28 provides as follows: "And be it further enacted that it shall be lawful for any such association to purchase, hold and convey real estate, as follows: *First.* Such as shall be necessary for its immediate accommodation in the transaction of its business. *Second.* Such as shall be mortgaged to it *in good faith* by way of security for debts previously contracted. *Third.* Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. *Fourth.* Such as it shall purchase on sales under judgments, decrees or mortgages held by such association, or shall purchase to secure debts due to said association. Such association *shall not purchase* or hold real estate in any other case or for any other purpose than as specified in this section, nor shall it hold the possession of any real estate under mortgage, or hold the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years."

This is the whole of the section and all of the law having any bearing upon the question; the *italics* are those of the appellant's counsel, and serve to call attention to the particular language upon which their claims are grounded. It is claimed by the defendants, Mary M. Haire and her husband, John Haire, that the mortgage was executed to secure a debt contracted contemporaneously with its execution, and if it was intended to inure to the benefit of the bank, it was void by force of the section of the act of Congress above quoted, and hence cannot be foreclosed in favor of the plaintiff.

We would not construe this, or any other statute, strictly and by its very letter only; but would look to its object and purpose, and give to its language such just and fair interpretation as would most completely effectuate that purpose. Not forgetting this, let us look first at its terms. It does not prohibit the mortgage of real property to another to be by that other held as security for a contemporaneous loan made by the bank; it says in effect that the bank may hold such real estate as shall be *mortgaged to it* in good faith for debts previously contracted, and that *such association* (bank) shall not hold real estate for any other purpose than as specified. Now, it will be noticed that the real estate in controversy was not mortgaged *to* the plaintiff and that the plaintiff does not now hold it. Hence, this case is not within the letter of the statute.

But it is claimed that the effect of the transaction, as claimed by plaintiff and as proved, is the same as a mortgage to it, and therefore, it is within the spirit or purpose of the law. When prudent officers of a bank are asked to make a loan, they look *inter alia* to the ability of the borrower to pay as evidenced by his property, real and personal. If he has not sufficient property, they decline the loan; but if some friend of his shall convey to him in fee sufficient real estate, the same officers might make the loan. The loan, so made, would not be within the act, although the officers, in good faith, relied upon such real estate by way of security for the repayment of the loan. And, if an indorser was offered who was thought insufficient, but when certain real estate was conveyed to him, he was regarded as sufficient, the rule would be the same. And, if, instead of being conveyed absolutely, it was simply mortgaged to the indorser, and thereby he was thought to be sufficient security, the rule would not be different. In either case the reliance would be upon the real estate and the ability to pay by reason of it. Neither would be within the prohibition of the act of Congress. Nor would it alter the case, if the borrower or indorser should say to the officers, if I fail to pay at maturity, there is the real estate and you may subject it to the payment of the debt. This they could do without such declaration. In other words, every loan or discount by a bank is made in good faith, in reliance, by way of security, upon the real or personal property of the obligors, and unless the title by mortgage or conveyance is taken to the bank or directly for its use, the case is not within the prohibition of the

statute. The fact that the title or security may inure indirectly to the security and benefit of the bank will not vitiate the transaction. Some of the cases upon quite analogous statutes go much further than this. *Silver Lake Bank v. North*, Johns. Ch. 370.

There is another view of the entire transaction which leads to the same conclusion. It is this: If we look to the transaction in view of its ultimate effects only, then we would find that the mortgage becomes a security to the bank and that the money was wholly applied to debts of the mortgagor previously contracted. So that, upon *its face*, the transaction is not inhibited by the statute, nor does it effectuate results contrary to either its letter or spirit. The manifest purpose of the inhibition was to prevent such associations from acquiring or holding the title to real estate, except so far as necessary in order to accomplish the legitimate objects for which they were created.

V. A point is made, but not confidently pressed, that the evidence shows Mrs. Haire to have executed the mortgage under duress of her husband. She does not so directly testify; and the testimony, on that point, aside from hers, is entirely against such a theory.

Some effort is also made to show that the notes sued upon, or now held by the bank, are different from the notes described in the bond, and hence, a foreclosure cannot be had. But there is no dispute that the notes were given in renewal of those described in the bond, and that the original debt secured by the mortgage is evidenced by them. This is sufficient.

VI. On the part of the assignee in bankruptcy, it is urged, that since the assignment of the bond and mortgage was made within four months prior to the bankruptcy proceedings, and after the plaintiff had actual knowledge, as it is claimed, of acts of bankruptcy, no rights could be acquired thereby. But, as we have seen, the rights of this plaintiff inhere in, and arise out of the original transaction and relate to it. So far as its real equities are concerned, the date of the assignment by the attorney in fact of the mortgagee is quite immaterial. No question is made by the assignee or other party respecting the rightful jurisdiction of the District Court of the State over the whole matter.

We have given to the case a careful examination and find our views result in entire accord with those of the learned district judge who tried the case in the court below. Inasmuch as the evidence

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tends to show a homestead right in a part of the mortgaged property, it will be ordered that the homestead shall not be sold, except to satisfy any deficiency remaining after the sale of the other property liable to either a general or special execution in this case.

*Affirmed.*

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SPAFFORD V. THE FIRST NATIONAL BANK OF TAMA CITY.

(37 Iowa, 181.)

*National banks — Right to take chattel mortgage.*

A National bank has a right to take a chattel mortgage for the purpose of securing a previously contracted debt, and to enforce the same.

THE plaintiff avers that Warren was owner of a private bank, called the Tama County Bank, with which the plaintiff did business for a year or more, prior to September 30, 1871; that loans had been made to and overdrafts allowed him at usurious rates, and thereby, at said date, he owed said bank \$7,762.05; that \$5,000 was due by note and the balance on account; that at said date the First National Bank of Tama city, a corporation under the laws of Congress, with a capital of \$50,000, and in which Warren was cashier and principal stockholder, was organized and commenced business; that on said date, the business of the said Tama County Bank was transferred to the National bank, and, also, by agreement between plaintiff and Warren, cashier, the said claim, including usury, was transferred to said National bank, and plaintiff executed to said National bank two notes for the \$5,000 note, one for \$3,000 and the other for \$2,000, and at the same time, also, executed a chattel mortgage to said bank, on the stock of goods in controversy, to secure said \$3,000 note; that the balance of said claim was simply transferred from the books of one bank to the books of the other; that plaintiff afterward continued to do business with the National bank, up to the 17th day of February, 1872; and that said National bank, by agreement with the plaintiff, and contrary to the law of its organization, also received and charged usurious interest on loans

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to, and on drafts by, plaintiff up to said last date, when on settlement and by including all said usury, it was found that the plaintiff owed said National bank \$9,000, and for which plaintiff executed his five several notes, and also executed a chattel mortgage on the stock of goods in controversy, to secure them; that not more than \$50 of said sum was due defendant, after excluding usury, which sum plaintiff had offered in writing to pay, and it was refused; that defendant, the bank, had seized the stock of goods, and was about to sell them under the mortgage. Plaintiff asked an injunction against the sale of the goods; that the mortgage be declared null and void, and for an accounting, etc. A temporary injunction was allowed.

The defendants for answer, deny *in toto* the usury, transfer of the business of one bank to the other, the transfer of plaintiff's account as stated, and admitted, substantially, all the other averments of the petition; and also averred that the National bank loaned to plaintiff, on the date named, September 30, 1871, the \$5,000 evidenced by the two notes, and the \$2,762.05, stated as being in a book account.

On these pleadings, the plaintiff moved for judgment, as prayed for in the petition, because it appeared from the pleadings that the chattel mortgage was taken in violation of the act of Congress under which the defendant, the National bank, was organized. This motion was overruled; and the plaintiff appeals.

*G. R. Struble and Applegate & Kinne*, for appellant.

*Stivers & Safely and Harmon & Mills*, for appellees.

COLE, J. The only ground assigned in the motion is that the mortgage was taken in violation of the law of Congress entitled "An act to provide a National currency," etc. We can properly only consider and determine the questions made to and passed upon by the District Court. *Latterett v. Cook*, 1 Iowa, 1, and cases cited. Whether such a motion as was made in this case can properly, under Revision, section 3138, be made and entertained at the stage of the case when it was done and before a trial, we do not decide; but conceding it properly made, we dispose of the question upon its merits.

From the pleadings it is apparent that the indebtedness secured by the mortgage was contracted to the National bank on and after

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September 30, 1871, and prior to the mortgage, February 17, 1872. The fact that a part of the debt, the note for \$3,000, was secured by a chattel mortgage contemporaneous with its creation to the bank, can have no hearing here, since that security has been canceled and surrendered. If its invalidity be granted, such invalidity would not follow the debt, which was in no manner tainted by it, into the new security subsequently acquired.

Conceding, as we do, that the National bank defendant, "being the mere creature of the law, possesses only those properties which the charter of its creation confers upon it" (*Dartmouth College v. Woodward*, 4 Wheat. 518), and conceding as we may (but without deciding it), that the second subdivision of section 28 of the National Bank Act, to wit: "*Second*, such as shall be mortgaged to it in good faith by way of security for debts previously contracted," relates only to real estate; yet there being no express prohibition we hold the mortgage valid, and that the authority in the bank to take, hold and enforce it, for a previously contracted debt, exists under the implied power to protect itself from loss, save its property and security from sacrifice, and successfully to execute the purpose of its creation. We thus hold, both upon principle and authority, as we think; and this, too, without calling in aid of the same conclusion, the express grant to such corporations of the same right as natural persons "to make contracts, sue and be sued," contained in section 8 of the act. *The First National Bank v. Haire*, 36 Iowa, 443 (*ante*, p. 480).

*Affirmed.*

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ELDER V. FIRST NATIONAL BANK OF OTTAWA.

(12 Kansas, 238.)

*Loans in excess of one-tenth of capital.*

A National bank will not be enjoined from transferring to an innocent third person securities taken to secure a loan, on the ground that such loan was in excess of one-tenth of its capital stock.\*

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\*The same point was ruled in *Shoemaker v. National Mechanics' Bank*, 31 Md. 396, but as it is well settled that a loan is not void because in excess of one-tenth of its capital stock it is not necessary to include that case in this collection.



PETITION for an injunction. The opinion states the case.

*J. W. Deford*, for plaintiff in error.

*A. W. Benson*, *contra*.

BREWER, J. Plaintiffs in error seek by this proceeding to have reversed an order of the district judge dissolving a temporary injunction. The facts, as disclosed in the petition (and this was all the evidence on the hearing) are briefly these: On the 20th of April, 1872, the First National Bank of Ottawa loaned to the plaintiffs \$14,954.08, which was an amount exceeding one-tenth of its capital stock, of which amount \$10,000 and interest was secured by a mortgage on real estate. The notes given for the \$4,954.08 were transferred to the National Bank of Lawrence, and by it, after maturity, placed in judgment. The notes secured by mortgage were not due when this action was commenced. It was alleged that this mortgage and securities were taken in violation of the National Banking Act under which the corporations defendant were organized, and that the Ottawa Bank threatened to transfer these notes and mortgage for value to some innocent purchaser before their maturity, and thus prevent the plaintiffs from availing themselves of their legal defense to them. The prayer was, that the Ottawa Bank might be temporarily restrained from transferring the notes and mortgage, and that upon a final hearing these instruments be decreed to be void, and ordered canceled. It is unnecessary for us to determine whether these securities are valid or not, for conceding that the whole transaction was one forbidden by the Banking Act, and that the notes and mortgage were void, and could not be enforced, still we think the petition discloses no cause of action, no ground for relief. The cardinal principle of equity, that which underlies its whole jurisprudence, is this, that he who seeks equity must do equity. To grant the plaintiffs the relief they ask would be in plainest disregard of this principle. They admit borrowing from the bank over fourteen thousand dollars of its money. They have never paid it back, but still hold it all. With this money of another's in their pocket they ask a court of equity to permit them to keep it. Grant that the bank was guilty of an infraction of the law in making the loan, and that by reason thereof it can never enforce payment in the courts; still,

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the wrong of the bank does not give to the plaintiff any moral right to appropriate the money of another. It is not enough for the plaintiff in an equity suit to show that the defendant has done wrong; he must also make it appear that he has done right. Many words could not make this plainer, and until they can make it apparent that it is according to equity and good conscience to borrow money and not repay it, the plaintiffs need expect no relief in an action like this. *Mott v. Trust Co.*, 19 Barb. 568. The case in many features resembles that of a usurious loan, and in such case it is well settled that the borrower must tender the amount borrowed before he can ask for the cancellation of the securities. 1 Story's Eq. Juris., § 301. The judgment will be

*Affirmed.*

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ORNN V. MERCHANTS' NATIONAL BANK.

(16 Kansas, 841.)

*Mortgage of real estate to National bank.*

A National bank took a mortgage on real estate to secure the payment of money previously loaned. There was a prior lien on the property which the mortgagor agreed to discharge, but he being unable to do so, the bank at his request and in order to protect its own lien advanced the money and took another bond and mortgage to secure such advance. *Held*, that such second bond and mortgage were valid.\*

**A**CTION to foreclose a mortgage given by the defendant Ornn to the plaintiff, a National bank. The court found the following facts:

"1st. That at the time of the execution of the note and mortgage stated in this case, the defendant, Lewis Ornn, owed the plaintiff about \$4,000; that \$2,500 of this sum was secured by a mortgage upon his mill at Cherokee, Crawford county, and the remaining \$1,500 was secured by a deed conveying to the plaintiff certain property in the city of Chicago, Illinois, both of which last-mentioned securities were taken to secure indebtedness existing against Ornn prior to their being taken by plaintiff.

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\* See *Kansas Valley National Bank v. Rowell*, ante, p. 264, and case referred to in note.

"2d. That this Chicago property was originally owned by one Walker, who sold it to one Watson, who sold it to defendant Lewis Ornn. The property was valued at about \$4,000, and Watson executed to Walker a deed of trust for \$2,000 of the purchase-money. This deed of trust was an existing lien on the property at the time it was conveyed by Watson to Lewis Ornn, and at the time he conveyed it to plaintiff, and which said existing lien Ornn agreed to pay off when due, and protect the second lien held by plaintiff of \$1,500.

"3d. That after the Chicago property was conveyed to the plaintiff, \$500 of the indebtedness upon said deed of trust became due and payable, and the plaintiff, upon the request of Lewis Ornn, and in order to protect its lien of \$1,500 from being lost, paid it; and the note and mortgage in suit here were given for that \$500, but were given before said payment was made; and that the plaintiff, after taking this note and mortgage, sent drafts to Chicago to make payment of said \$500.

"4th. That the property described in the mortgage in suit here, at the time of the making of the note and mortgage, was the homestead of the defendants, Lewis Ornn and his wife, Abbie E. Ornn.

"5th. That the plaintiff is a National bank.

"And as a conclusion of law, the court finds that this mortgage is valid under the National Banking Law."

*McComas & McKeighan*, for plaintiffs in error.

VALENTINE, J. [After deciding a question of practice.] The plaintiffs in error also claim that the mortgage now sued on is void. They claim that it is void for the reason that it is a mortgage upon real estate given to secure a debt concurrently created. The facts affecting this question are substantially as follows: The bank is a National bank. Lewis Ornn owed it a large sum of money. To partially secure the payment thereof he gave a mortgage to the bank on some property owned by him in Chicago, Illinois. There was a prior lien of \$2,000 on said Chicago property which Lewis Ornn agreed to pay. Five hundred dollars of the same afterward became due, and the bank, in order to save and protect its own lien on said Chicago property, and at the request of said Lewis Ornn, paid said sum of \$500, and then took the note and mortgage now sued on for that amount on property situated in Crawford county,

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Kansas. We think the mortgage is valid. The taking of the mortgage under such circumstances was not a violation of the National Banking Law. We think the bank had a right to get all the security it could for money which it necessarily had to pay out. And therefore we do not think that the mortgage is void.

The judgment of the court below is affirmed.

All the justices concurring.

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GRAVES, appellant, v. THE LEBANON NATIONAL BANK.

(10 Bush, 23.)

*Bank — Sureties on official bond of cashier released by negligence of directors — Presumption as to date of instrument — Acceptance of bond.*

Defendants became sureties on the official bond of a bank cashier, being induced so to do by a statement published by the directors, according to law, whereby the affairs of the bank appeared to be well managed. The cashier of the bank was a defaulter when the statement was published, of which fact the directors, by the use of slight care, might have learned. In an action on the bond for subsequent embezzlements, *held*, that the sureties were not liable; they had a right to believe that, before publishing the statement, the directors had used reasonable diligence in ascertaining the condition of the bank, and, being misled by the statement, were not bound. A bond was dated the — day of — 1869. *Held*, that the legal presumption was that it did not become binding on the obligors until the last day of that year.

It is not essential that National banks shall signify their acceptance of the official bonds of their officers in writing.\*

**A**CTION against the sureties on an official bond. The opinion states the case.

*Roundtree & Rodman*, for appellants.

*W. J. Lisle* and *W. B. Harrison*, for appellees.

LINDSAY, J. The judgment now before this court for revision

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\* As to the bonds of officers of National banks and the liability of sureties thereon, see note to *Tapley v. Martin*, *post*.

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is that rendered in the cross-action of the *National Bank of Lebanon v. E. A. Graves, D. L. Graves, and R. C. Harris*, sureties for Mitchell, the defaulting cashier.

Although the bond sued on was executed to the president and directors of the bank, it is evident that it was for the protection of the association, and no sufficient reason is perceived why it may not maintain the action.

The right to take advantage of a supposed defect of parties appearing on the face of the cross-petition has been waived. Appellants did not make this defect a ground of demurrer, nor was it taken advantage of by plea. The answer goes to the merits of the controversy, and upon the issues raised the cause was prepared and submitted for judgment. The fact that there is a defect of parties plaintiff cannot be made a question for the first time in this court.

The National Bank of Lebanon organized under the provisions of the National Currency Act of June 3, 1864. It commenced business on or about the 3d of August, 1869, at which time Mitchell was selected as cashier, and was at once inducted into office. Although required to execute bond immediately, for reasons not satisfactorily explained by the record, the bond was not delivered until about the 1st of November following. In June, 1870, Mitchell was discovered to be a defaulter to a large amount. He failed to make good the losses occasioned by his breach of duty, or to sufficiently indemnify the bank, and this action was instituted to recover from his bondsmen the amount of these losses.

From what has already been said it is not necessary to notice further the technical defenses relied on by appellants, except to state that we do not regard it as essential that banking institutions doing business under the National Currency Act shall signify their acceptance of the official bonds of their cashiers by a written memorandum to that effect entered upon the journals or minute-books kept by their directory.

The acceptance of the bond may be presumed from the fact that after it has been submitted to the directory for approval it is retained by the bank, and the cashier permitted to enter upon or continue in the discharge of his duties; and that it was presented to and approved by the directory may be established by oral testimony. *Bank of United States v. Dandridge*, 12 Wheat. 64; *Dedham Bank v. Chickering*, 3 Pick. 335; *Amherst Bank v. Root*, 2

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Metc. (Mass.) 522; *Union Bank v. Ridgely*, 1 Har. & G. 324; 1 Morse on Banking, 223.

The defalcations for which appellants are sought to be held liable are alleged to have occurred between the 14th of September, 1869, and the 3d of June, 1870. The court below adjudged that the sureties in the bond should account for such as occurred after its acceptance, and rendered judgment against them for \$8,089.23.

The first business transacted by the bank after its organization was the purchase of the assets of the banking firm of Burton, Mitchell & Co.

Mitchell, the defaulting cashier, was a member of that firm, and had been acting as its cashier. The National Bank accepted from Burton, Mitchell & Co. bills and notes represented to amount to about fifty-one thousand dollars, but which in point of fact amounted to only about thirty-nine thousand dollars. This discrepancy was the result of embezzlements upon the part of Mitchell while acting as cashier for said firm. It may be presumed that Burton, the senior member of the firm, who became one of the directors of the National Bank, was ignorant of these embezzlements. The directory seem to have relied implicitly upon the integrity of Mitchell, and hence he was enabled not only to conceal the frauds practiced on Burton, Mitchell & Co., but by such concealment to commence the discharge of his duties as cashier of the National Bank by a fraud upon it.

In October, 1869, the banking association, pursuant to the provisions of section 34 of the National Currency Act, and the amendment thereto of March 3, 1869, made a report to the Comptroller of the Currency, and on the 23d day of that month caused it to be published in the Lebanon *Clarion*, showing in detail and under appropriate heads its resources and liabilities at the close of business October 9, 1869. This report was sworn to by Mitchell, and certified to be correct by three members of the directory.

Similar reports were made and published in the same newspaper touching the condition of the association on the 22d of January, the 24th of May, and the 9th of June, 1870. None of these reports showed embezzlements upon the part of the cashier or any officer connected with the bank. They were not only not calculated to excite suspicion as to the manner in which the affairs of the association were managed, but tended to inspire the public with confi-

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dence in its prosperity and in the integrity of those to whom its business affairs were committed

Appellants plead and rely upon the statements thus officially promulgated by the officers of the bank as constituting an estoppel upon it to assert against them claims that cannot be established without showing that these official reports, made and published in obedience to law, were not true. We are not inclined to the opinion that they can claim immunity upon account of any report made after they became the sureties of Mitchell. The reports are sworn to by him, and it may be assumed that upon his representations, and upon what appeared from the books of the association as kept by him, the directors were induced to certify to their accuracy.

The directors may have been negligent in the discharge of their duties, and this negligence may have enabled Mitchell for the time to misappropriate the funds of the bank, and to conceal its true condition by the false reports made to the Comptroller of the Currency and by false entries upon the books of the association. But this negligence cannot avail the sureties who covenanted that their principal should "well and truly perform the duties" of his position, and should "well and truly account for all moneys and other valuables that 'might' pass through his hands." Their covenant is unconditional, and no failure of duty upon the part of the directors of the association, short of actual fraud or bad faith, can be deemed sufficient to exonerate them from its performance. The exaction of the bond implies that the association was not willing to rely alone upon the watchfulness and care of the directory. It required in addition to that safeguard that the honesty and fidelity of its cashier should be guaranteed by sureties who were able to make good any losses it might sustain by reason of his negligence or dishonesty.

There is a question, however, arising upon the facts stated in the pleading and fully sustained by the proof, the decision of which, it seems to this court, must be in favor of the sureties; and this question being decided in their favor, their exoneration from liability on account of Mitchell's misconduct while acting as appellee's cashier, and after the bond was delivered and accepted, follows as a necessary sequence.

There is no principle of law better settled than that persons proposing to become sureties to a corporation for the good conduct and fidelity of an officer to whose custody its moneys, notes, bills, and

other valuables are intrusted, have the right to be treated with perfect good faith. If the directors are aware of secret facts materially affecting and increasing the obligation of the sureties, the latter are entitled to have these facts disclosed to them, a proper opportunity being presented. Morse on Banking, 226.

White and Tudor, in their note to the case of *Rees v. Berrington*, 2 Leading Cases in Equity, page 707, state the rule as follows: "Wherever, therefore, there is any misrepresentation, or even concealment from the surety, of any material fact which had he been aware of he might not have entered into the contract of suretyship, it will thereby be rendered invalid, and the surety will be discharged from his liabilities."

The cases cited by the commentators fully sustain the principles as stated.

Mr. Justice STORY takes even broader ground: "Thus, if a party taking a guaranty from a surety conceals from him facts which go to increase his risk, and suffers him to enter into the contract under false impressions as to the real state of facts, such concealment will amount to a fraud, because the party is bound to make the disclosure, and the omission to make it under such circumstances is equivalent to an affirmation that the facts do not exist." 1 Story's Eq. Jur., § 215.

The learned judge cites in this connection from *Maltby's case*, 1 Dow's Parliament Cases, the instance of a party who, knowing himself to have been cheated by his clerk, concealed the fact, applied for security in such a manner and under such circumstances as held out the clerk as one whom he considered as a trustworthy person, and thereby induced another to become his surety. The contract of suretyship thus obtained was held to be void, and silence under such circumstances being treated as expressive of a trust and confidence held out to the public equivalent to an affirmation.

It may not be true that the directors of the Lebanon Bank had actual knowledge of the frauds committed by Mitchell while cashier of Burton, Mitchell & Co., nor of the false entries made by him on the books of the institution under their control in order to conceal those frauds, but it is true that either with or without examination they published reports of the affairs of the banking institution, the natural if not the necessary effect of which was to mislead the public. That these reports reached the eyes of appellants we cannot doubt.



They each resided in or near the town of Lebanon, and were subscribers to and readers of the local paper in which the publications were made ; and as they were each largely interested as stockholders in the banking institution, it may be assumed that they read and examined at all events the first official statement made by the officers to whom they had intrusted the management of that portion of their estate invested in the stock of the banking association. If it could be shown that the directors were cognizant of the fraud of Mitchell, committed on the first day of his connection with the bank and in the performance of his first duty as cashier, and that they concealed this fact from these appellants, and permitted the false statement of October 9, 1869, to be forwarded to the Comptroller of the Currency and published to the world, there could be no shadow of doubt that the concealment and publication would amount to a fraud upon the sureties.

It is proper, however, to consider the legal effect of two circumstances connected with the failure of the directory of the bank, to apprise the sureties of the fraud of Mitchell, and of the publication of October 23 in the Lebanon newspaper. The first is, that the directors, or at least so many of them as were sworn as witnesses, state that they were not apprised of the perpetration of the fraud. The second is, that the report of October 9, 1869, published on the 23d of that month, was but a statement of the condition of the affairs of the association as shown by its books.

Upon the first question it is to be observed that several of the directors, and among them Burton, of the firm of Burton, Mitchell & Co., upon whose indorsement its assets were received by the Lebanon Bank, were not sworn at all ; and further that it appears upon the journal kept by the directory, as of date August 3, 1869, that " the bills of exchange and accounts of the firm of Burton, Mitchell & Co., bankers, having been submitted for examination and examined, it was resolved by the board of directors to receive the same, with the indorsement of Messrs. Burton, Mitchell & Co., and the cashier was directed to transfer the same to the books of the National Bank." Whether this written memorandum, kept by the directory as evidence of its official action, is or not conclusive as to the examination of the bills of exchange and accounts of the firm of Burton, Mitchell & Co., need not here be decided. The fact of the examination is not directly contradicted by any evidence in the

case, and for the purposes of this litigation the presumption should be indulged that it was actually made.

From the depositions of the president of the bank, of Wilson, a director, and of Wilkins, who was first the clerk and is now the cashier of the institution, it is manifest that the most cursory examination of the bills, notes, and accounts turned over to the bank by Burton, Mitchell & Co. would have disclosed a deficit of more than twelve thousand dollars.

We cannot, without disregarding the proof before us, fail to conclude that the directory either was advised of this discrepancy in Mitchell's accounts, or that it relied on his representations and the indorsement of Burton, Mitchell & Co., and made no examination, notwithstanding the bills, notes, and accounts purchased amounted in the aggregate to more than half as much as the capital of the institution for which they were acting.

The directors may not have been bound to notify the sureties of the manner in which this transaction was conducted; but most assuredly these parties had the right, under the circumstances, to presume that in the first business transaction of the bank, involving as it did so considerable an amount, the directory exercised at least slight diligence, and this presumption was greatly strengthened by the published report appearing on the 23d of the following October. A fraud may be perpetrated as well by the assertion of facts that do not exist, ignorantly made by one whom the person acting upon the assertion has the right to suppose has used reasonable diligence to inform himself, as by concealing facts known to exist which in equity and good conscience ought to be made known.

The publication as to the resources and liabilities of the association on the 9th of October, 1869, does not purport to have been made from its books. It was styled "Report of the Condition of the National Bank of Lebanon at the close of business October 9, 1869." The resources and liabilities are stated under appropriate heads. The report is sworn to by the cashier, and its accuracy attested by three members of the board of directors.

There is nothing in the publication to indicate that it was founded upon the books of the association. The clear import of the language used is that it exhibits the actual condition of the affairs of the bank.

It is in proof that the forms furnished by the Comptroller of the Currency authorized the reports to be made out from the books;

but it is not shown that the sureties knew any thing about these forms ; and looking to the law defining the duties as well of the Comptroller as of the officers of the bank, they would acquire no such information.

The 34th section of the Currency Act requires every association organized under its provisions at stated times to make reports to the Comptroller, which "shall exhibit in detail and under appropriate heads the resources and liabilities of the association before the commencement of business on the morning of the first Monday of the months of January, April, July, and October of each year." The amendment of March 3, 1869, requires five of these reports each year to be verified by the oath or affirmation of the president or cashier and attested by the signature of at least three of the directors, each of which is to be published in a newspaper published in the place where the association does business, if there be one, and if not, then in a newspaper published in the county nearest thereto. This amendment provides, as did the original act, that the resources and liabilities of the association shall be reported ; and as conclusive evidence that the actual and not the apparent resources and liabilities are to be reported, the Comptroller is empowered by the amendatory act to call for special reports from any particular association whenever in his judgment it shall be necessary, "*in order to a full and complete knowledge of its condition.*"

It seems therefore that before the delivery and acceptance of the cashier's bond, and before appellants had become guarantors for his diligence, honesty, and fidelity, the banking association, pursuant to the provisions of the law to which it owed its existence, published to them and to the world a statement of its condition, from which it appeared that its affairs were being prudently and honestly administered, and from which they and the public had the right to believe that the cashier, to whom had been intrusted the moneys, notes and valuables of the bank, had up to that time acted as a trustworthy person.

If the sureties acted upon the impression thus created by the affirmative act of the party now claiming to enforce the stipulations of their bond, it is plain that they should be discharged from liability.

For reasons satisfactory to our minds we have already decided that it should be presumed that the sureties did read and examine

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the report published in the *Clarion* of the 23d of October, 1869. It yet remains to be determined whether the bond was accepted before or after that time. It bears no date except "the day , 1869." The legal presumption therefore is that it did not become binding on the bondsmen until the last day of that year.

The bank fails to show the exact date of its delivery. One of the directors gives it as his recollection that it was about the 1st of October, 1869. The president and one other director fix the time of delivery at about the 1st of November, 1869, and the president states as a circumstance conducing to sustain his recollection that he was in that year a member of the State Legislature, and that the bond was handed to him a month or more before he left for Frankfort, which was early in December. The directory itself was not willing to fix the date of the acceptance of the bond, and in an order entered upon its minute-book, purporting to record the action of the board at the time of its approval, neither the month nor the day is given.

Considering the presumption arising from the want of a specific date to the bond and the preponderance of the testimony offered by the bank itself, we conclude that it was not accepted earlier than the 1st of November, 1869, about one week subsequent to the publication of the report of October 9th of that year.

We have, therefore, a case in which the directory of the bank held out to others as a trustworthy officer a man who had been guilty of repeated embezzlements and frauds, all of which might have been discovered by the exercise of slight diligence. However innocently the publication tending to show that Mitchell was an honest and faithful officer may have been made, the fact remains that the public had the right to act upon the presumption that the three directors attesting the accuracy of the statements contained in the publication had made some investigation at least to inform themselves as to the matters to which it related.

The effect of the published report was to inspire the public with confidence in the officers of the bank, to disarm suspicion, and to prevent inquiry.

The losses occasioned by the fraudulent appropriations by Mitchell of the bank's money after the acceptance of his bond must fall upon either the association or upon his sureties. The latter are free from blame. They acted in the matter with reasonable prudence and discretion. They relied upon the truth of representa-

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tions made by those having the right to speak for the bank. These representations have turned out to be untrue. Had the sureties suspected that they were untrue, it cannot be supposed they would have entered into the contract of suretyship. Such being the case, the contract must be adjudged invalid.

The judgment against the sureties is reversed, and the cause remanded with instructions to dismiss appellee's cross-petition.

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NEWELL v. NATIONAL BANK OF SOMERSET.

(12 Bush, 57.)

*Interest — What rate National banks may exact — State courts will not enforce penalties imposed by act of Congress.*

By the statute of Kentucky no more than six per cent interest could be exacted, but parties were allowed to contract to pay and receive ten per cent "by memorandum in writing, signed by the party chargeable thereon, and not otherwise." A National bank located in the State discounted notes, charging interest in advance at the rate of ten per cent without other "memorandum in writing" than the notes, wherein was a promise to pay the principal and accrued interest at the rate of ten per cent. *Held*, that the transaction was not usurious.

*Semle*, that the State courts will not enforce the penalties imposed by the National Banking Act for exacting unlawful interest.\*

**A**CTION by the National Bank of Somerset against Newell and others, on promissory notes discounted by the bank. There were three cases. Judgments were rendered for the plaintiff below and the defendants appealed.

*Fox and Morrow and A. J. James*, for appellant.

*John S. Van Winkle*, for appellee.

LINDSAY, J. These three appeals present the same question.

J. R. and J. P. Ingram, with these appellants as sureties, commenced in 1872 to borrow money from the appellee. The notes were made payable to one or more of the accommodation parties,

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\*See *State v. Tuller*, ante, p. 375; *Missouri River Telegraph Co. v. National Bank*, ante, p. 401; *Ordney v. Central National Bank*, post.

and by him or them indorsed to the bank. They were made to run four months, and were from time to time renewed as they fell due. The bank, at the time of the discounting of the first notes and at each and every renewal, retained the interest in advance. The sums so retained were in proportion to ten per cent per annum upon the face of the notes.

The notes last accepted in the way of renewals were not paid at maturity, and these actions were instituted to enforce their collection.

The sureties pleaded the facts above set out, and insist that the bank, by retaining the said amounts of interest in advance, in effect charged and received interest at a rate greater than ten dollars upon one hundred dollars for a year, and that it thereby violated the fifth section of the act of March 14, 1871 (Session Acts 1871, page 61), and the fourth section of article 2, chapter 60, General Statutes, and forfeited to the borrowers the whole amount of interest paid.

They further claim that it also violated the 30th section of the National Currency Act of June 3, 1864, and forfeited to the borrowers twice the amount of the interest paid.

They sought to have their claims arising out of those supposed forfeitures set off against the notes sued on, and prayed to be credited by the amounts thus made up.

We need not inquire as to the rights of the parties under the provisions of the act of Congress. The forfeitures claimed under said act are highly penal in their nature. The courts of this State have not up to this time undertaken to enforce penalties arising under the laws of the government of the United States, and these cases present no sufficient reason to authorize the inauguration of a new judicial policy upon that subject.

It is undoubtedly true that by retaining out of the sum loaned the full amount of the legal interest that would accrue thereon during the time for which the note is to run, banks are enabled to realize upon their available capital a greater rate of interest than could be realized if the interest was not collected until the note became due; but the practice of thus discounting bills or notes began with the business of banking, and was soon so firmly established that the courts sanctioned it almost of necessity. 3 Parsons on Contracts, 131.

This practice must be confined to short paper; and the instru-

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ment discounted, or upon which the interest is taken in advance, must be such as will circulate in the course of trade, or such as by statute has been placed upon the footing of that character of paper. *Id.* 132; *Firemen's Insurance Co. v. Ely*, 2 Cowen, 703.

The deduction of legal interest from the face of the note or bill discounted has always been tolerated in this State; and it was long since held by the Supreme Court of the United States that transactions of that sort are not to be treated as usurious. 8 Wheaton, 354; 3 Peters, 40.

We find nothing in the legislation of this State upon the subject of interest and usury to take such transactions out of the general rule applied to them by the courts of the United States and of our various sister States. We therefore conclude that neither section 5 of the act of March 14, 1871, nor section 4, article 2, chapter 60, General Statutes, entitles appellants to recover the supposed forfeitures claimed in their several answers.

But there is still another view of the case. It is not denied that interest, at the rate of ten per cent per annum, was collected in advance on each and all of the notes indorsed to the bank. By the laws of the Commonwealth, no more than six per cent interest can be lawfully collected for the loan or forbearance of money, unless it be upon contract, evidenced by a memorandum in writing signed by the party or parties chargeable thereon. Acts 1871, page 61. The General Statutes provide that the contract must be "by memorandum in writing, signed by the party or parties chargeable thereon, and not otherwise."

It is not denied that the borrower may pay and the banks receive interest at the rate of six per cent per annum under oral agreements; but appellants insist that the additional four per cent admitted to have been paid was usury, and claim that the bank cannot refuse to credit each note by the excess of interest over six per cent paid on the debt evidenced by it, unless the payments were made under contracts reduced to writing and signed by the parties charged therewith.

Strictly speaking, there were no written memorandums authorizing the bank to collect interest in advance; but the notes signed and delivered to the bank were written memorandums signed by the parties to be charged, and they evidenced the contracts or agreements to pay at maturity to the bank sums of money equal to the principal and the accruing interest, at the rate of ten per

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Huffaker v. National Bank of Monticello.

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cent per annum for the time they were each to run. It follows, therefore, that the contracts touching the payment of interest on the various notes conformed to the spirit and letter of the conventional interest law, and that they were properly upheld by the Circuit Court.

Consequently the judgments of said court, refusing to allow the defenses relied on by the appellants in the three cases under consideration, must be

*Affirmed.*

By an act to amend chapter 60 of the General Statutes of Kentucky, title "Interest and Usury," approved March 14, 1876, the General Statutes are so amended as to change the rate of conventional interest from not exceeding ten to not exceeding eight per centum per annum Session Acts 1876, page 68.

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HUFFAKER v. NATIONAL BANK OF MONTICELLO.

(12 Bush, 287.)

*Organization of National bank—How put in issue.*

The organization of a National bank under the National Banking Act may be put in issue by a party who has not estopped himself. But a party who has accepted as payee a promissory note payable at a banking institution which the parties to the note style a National bank, and has sold and transferred the note to such banking institution, cannot be allowed to raise that issue by merely averring want of knowledge or information sufficient to form a belief as to whether the institution is a body corporate, etc. \*

**A**CTION by the National Bank of Monticello against Huffaker and others, as indorsers of a promissory note, payable at the plaintiff's bank, and by the said defendants, who were payees, indorsed and transferred to the plaintiff. The defendants answered, alleging want of knowledge as to whether the plaintiff was a National bank. We give below only such part of the opinion as relates to National banks.

*Gibson and Gibson*, for appellant.

*J. S. Van Winkle and Alexander & Dickinson*, for appellees.

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\* See *Hungerford National Bank v. Van Nostrand*, post.



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Schmidt v. The First National Bank of Selma.

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LINDSAY, C. J. [After deciding questions of practice.] The demurrer to the first paragraph of the appellants' answer was properly sustained. We do not doubt the right of a party who has not estopped himself from so doing to put in issue the organization of a corporation professing to have organized and to be doing business under the provisions of the act of Congress known as the National Currency Act. But when, as in this case, the party attempting to raise such an issue has accepted as payee a promissory note made payable at a banking institution which the parties to the note style a National bank, and has sold and transferred said note to said banking institution, he cannot be allowed to raise the issue by merely averring want of knowledge or information sufficient to form a belief as to whether the institution is a body corporate organized and doing business under the act of Congress. Whilst he is not estopped to make the defense, he has placed himself in an attitude which makes it his duty to ascertain from an examination of the public records of the treasury department of the general government whether the association with which he has been voluntarily dealing has authority to do business as a National bank.

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SCHMIDT V. THE FIRST NATIONAL BANK OF SELMA.

(22 Louisiana Annual, 314.)

*Paramount lien of United States on assets of National banks.*

The National Banking Act gives to the United States a first and paramount privilege upon all the assets of a banking association organized under the act to reimburse to the United States the amount expended in paying the circulating notes of such bank association. Therefore, the privilege given to an attaching creditor over the assets of the First National Bank of Selma must be postponed to that of the privilege of the United States where it is shown, as in this case, that the Louisiana National Bank, a debtor of the First National Bank of Selma, had notice of the claim of the United States on the assets of the First National Bank of Selma before the seizure by the creditors under the attachment.

**A** PPEAL from Seventh District Court, parish of Orleans. COL-  
LENS, J.

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Schmidt v. The First National Bank of Selma.

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*Budd and Grover*, for plaintiffs and appellee.

*E. Pearson*, for defendant and appellant.

TALLAFERRO, J. The plaintiffs, being holders of two drafts or checks drawn upon the Louisiana National Bank by the First National Bank of Selma, in Alabama, and their payment being refused, brought suit in New Orleans against the Selma Bank, proceeding by attachment and process of garnishment. The Louisiana National Bank answered, through its officers, that there were funds of the Selma Bank in their custody, but that they had been notified by the government, prior to the notice served on them, of seizure by the plaintiffs, that it claimed a lien upon all the assets in their hands, belonging to the Selma Bank, and ordered that they be held subject to the claim of the United States. Cadle, who had been appointed receiver of the First National Bank of Selma, appeared and filed an exception to the plaintiffs proceeding, on the ground, that, at the time of the institution of the plaintiffs' suit and long prior thereto, the Selma Bank was in liquidation; that he had been duly appointed receiver thereof, and that the court before which the plaintiffs brought their action, is without jurisdiction. A curator *ad hoc* was appointed, who subsequently filed an exception of similar import, and these exceptions being overruled, the curator answered by general denial. A judgment was rendered in favor of the plaintiffs with privilege upon the property attached.

This judgment was signed in the lower court on the 19th of June, 1868. An execution was issued, and the receiver came in as third opponent, claiming that he was entitled to be put into possession of all the assets of the Selma Bank in controversy, in preference to any and every lien or privilege set up by Schmidt & Ziegler, averring his privilege to be established by the Currency Act of Congress, approved June 3, 1864; and that on or about the 17th of April, 1867, the First National Bank of Selma, having failed to redeem its notes as required by law, the Louisiana National Bank, the garnishee in this case, was duly notified thereof, and that the government of the United States had, and claimed a lien upon all the assets of the Selma Bank in possession of the Louisiana National Bank, and that it was ordered to hold all such funds and assets subject to the claim and lien of the United States.

To this third opposition the plaintiff opposed the plea of *res judi-*

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Schmidt v. The First National Bank of Selma.

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*cata*, alleging that the same matter now set up in the opposition had been presented in this case by defendant before judgment rendered, and were decided by that judgment adversely to him.

A judgment was rendered on this third opposition, on the 29th of June, 1869, by the judge of the Seventh District Court of New Orleans, the case having been transferred to that court from the Third District Court. The judgment was in favor of the plaintiffs, and the defendant, on the 2d of July, 1869, took an appeal from both judgments; the appeal being devolutive as to the judgment on the 19th of June, 1868, and suspensive as to that of 2d of July, 1869. The plaintiff opposes prescription in bar of the opponent's right to appeal from the judgment rendered on the 19th of June, 1868.

This cannot avail him, the opponent not being a resident of the State, may appeal within two years. The plaintiff acquired no right as against the United States by attaching the assets of the Selma Bank, or the Louisiana National Bank, of New Orleans.

It is expressly provided by the act of Congress, approved the 3d of June, 1864, entitled "An act to provide a National currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," in regard to the associations for banking purposes authorized by that act, "that for any deficiency in the proceeds of the bonds pledged by such association when disposed of as hereinafter specified, to reimburse to the United States the amount so expended in paying the circulating notes of such association, the United States shall have a first and permanent lien upon all the assets of the association, and such deficiency shall be made good out of such assets in preference to any and all other claims whatever, except the necessary costs and expenses of administering the same."\* This law enacted in the public policy of the country by the Congress of the United States none can be presumed to be ignorant of. It is shown that previous to notice to the Louisiana National Bank of the plaintiff's seizure in its hands of the assets of the Selma Bank, the Louisiana National Bank had been notified of the lien claimed by the government upon these assets, and ordered to hold the same subject to the claim of the United States.

The right of the receiver of the Selma Bank to the possession

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\* This language is substantially repeated in Rev. Stats., § 5230.

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State v. Gasting.

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and control of the assets in question, we think fully made out, and conclude that the judgment of the lower court is erroneous. It is therefore ordered, adjudged and decreed that the judgment of the District Court be annulled, avoided and reversed. It is further ordered that there be judgment in favor of the defendant and opponent, and that he, in his capacity of receiver of the First National Bank of Selma, have and be put into possession and control of all the assets of the Selma Bank in the Louisiana National Bank of New Orleans, and which constitute the subject-matter of this controversy. It is further ordered that the plaintiffs and appellees pay all costs of this suit.

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## STATE V. GASTING.

(23 Louisiana Annual, 1899.)

*National bank bills are "United States currency."*

The notes or bills issued by the National banks of the United States, which are authorized by law to circulate throughout the Union as a medium of trade, are included in the phrase, "United States currency."\*

Larceny of such notes is, therefore, larceny of United States currency.

**A** PPEAL from the Eleventh Judicial District Court, parish of Union. EGAN, J.

*W. W. Farmer*, district attorney of the Fourteenth Judicial District, for the State.

*J. and J. W. Young*, for defendant and appellant.

HOWE, J. The defendant was indicted for larceny of ten dollars in "United States currency," ten dollars in gold coin, and ten dollars in silver coin. He was tried, convicted, sentenced to hard labor, and has appealed.

The only question presented is raised by the defendant's bill of exceptions, and is, substantially, whether notes or bills of National banks are included properly in the phrase, "United States currency."

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\* See *Horne v. Green*, post.

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State v. Gasting.

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The act of Congress by which the associations known as National banks were authorized, is entitled "An act to provide a National currency, secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof," and its title seems to be a correct index to its contents. The notes or bills issued are not only receivable at par, in all parts of the United States, in payment of taxes, excises, public lands and all other dues to the United States (except for duties on imports), but also they are a legal tender for all salaries and other debts and demands owing *by* the United States to individuals, corporations and associations within the United States (except interest on the public debt). Laws of 1863, p. 670, § 20.

They are prepared by the officers of the treasury and bear their engraved signatures and seal. The words "National currency" are emblazoned conspicuously upon them, being derived, evidently, from the title of the act. They circulate in all parts of the Union, being everywhere received at par as a medium of trade, without regard to the local domicile of the associations, respectively.

Currency may be properly defined as something which circulates as a medium of trade. It conveys at the present time the idea of paper money, of some sort. National currency is that which is issued under the sanction of a nation. The nation which authorizes the issue of what we term National bank notes is the United States. Considering, therefore, the title and terms of the act of February 25, 1863, above cited, in connection with these familiar definitions, we think it fair to decide that the phrase "United States currency" includes the "National currency" authorized by the United States—declared to be for many important purposes a lawful tender—and designed to circulate as a medium of trade in all parts of our country.

*Judgment affirmed.*

## ADAMS V. DAUNIS.

(29 Louisiana Annual, 315.)

*Actions against National banks and receivers of National banks.*

National banks, like any other corporations, and the receivers of them may sue and be sued in the State courts of their domicile.

The receiver of a National bank is amenable to the jurisdiction of a State court in a parish other than that in which the bank was located and in which he has his domicile.\*

**A**PPEAL from the Fifteenth Judicial District Court, parish of Lafourche, BEATTIE, J.

*Clay Knobloch*, for plaintiffs and appellees.

*J. D. Rouse* and *Andrew J. Murphy*, for N. W. Casey, receiver.

MARR, J. On the 24th of February, 1860, Tucker Brothers executed a mortgage, which was recorded on the same day, on a plantation in the parish of Lafourche, in favor of Robert Tucker or any future holder, to secure four promissory notes for five thousand dollars each, of which two only seem to have been used.

The Bank of New Orleans held one of these notes, and Godfrey Barnsley held the other. The bank obtained judgment against Tucker Brothers on the note held by it, with recognition of the mortgage, which was recorded as a judicial mortgage on the 28th of June, 1867. Barnsley brought suit on the note held by him, which was not prosecuted to judgment; and it seems to have been discontinued.

Execution issued on the judgment in favor of the bank, under which the sheriff seized the mortgaged property, and sold it on the 7th of September, 1867, to A. W. Cummings, for cash.

The first mortgage in date bore on part only of the property, and was in favor of Gaubert and Richard, who had obtained judgment against Tucker Brothers for the amount due them, which was recorded as a judicial mortgage on the 14th of July, 1866; and

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\* See *Kennedy v. Gibson*, ante, p. 17; *Bank of Bethel v. Pahquioque Bank*; *Cadle v. Tracy*, ante, p. 230; *Commercial Bank v. Simmons*, ante, p. 294; *Cook v. State National Bank*, post; *Crocker v. Marine National Bank*, post.

the next in rank was that under which the bank and Barnsley claimed. The price of the adjudication was not sufficient to pay the amount due these creditors in the second rank. Of course the junior mortgagees were cut off, and the creditors in the first and second ranks were the only persons who were interested in the distribution of the proceeds of the sale.

The sheriff, in his return, after the usual recitals, states that the property was adjudicated to the last and highest bidder, A. W. Cummings, "for and in consideration of the sum of \$13,025, paid *as follows*, to wit .

"First. The purchaser retained in his hands the sum of \$1,851.10," the amount due to the first mortgage creditors, Gaubert and Richard, "which amount *remained secured by same mortgage.*"

"Second. The balance of adjudication, \$11,173.90, *is applied* to the settlement of the claim of the plaintiff and Godfrey Barnsley, each holding a five-thousand-dollar note, secured by the second mortgage \* \* \* in the following proportions, the fund being insufficient to extinguish these claims, viz. : to the bank, to cover principal, interest, and costs, *pro rata*, \$6,269.50 ; to G. Barnsley, *pro rata*, \$4,904.40 ; as will more fully appear by act of compromise and agreement between the parties, etc."

The agreement referred to in the return is of the same date as the sale. It begins with the declaration by Cummings "that he has this day purchased at sheriff's sale, in the case entitled the *Bank of New Orleans v. Tucker Brothers*, for cash ;" and then follows a description of the property and statement of the price of the adjudication. The agreement then recites : "That the purchase-price was not in reality paid in cash ; but the purchaser compounded and compromised with the mortgage creditors hereinbefore named, who agreed to give him time *without*, however, *impairing or novating their original claims, the right to enforce which they expressly reserve.*"

The payments were to be in three installments. With respect to Gaubert and Richard, declared to be the creditors first in rank, after dividing the \$1,851.10, to be paid them, into three parts, as agreed upon, and fixing the dates from which they are respectively to bear interest, the agreement states :

"It is distinctly understood, however, that if any of these installments should not be paid at maturity the whole amount shall be

exigible, and Gaubert and Richard shall be and are hereby authorized and expressly empowered to enforce the aforesaid judgment in case No. 487 on the tract to them mortgaged specially by privilege, the said Cummings binding himself to interpose no objection or obstacle thereto."

After dividing the \$4,905.40 to be paid to Barnsley and the \$6,-269.50 to be paid the bank into three parts each, and fixing the dates of payment and the time from which they are to bear interest, the agreement proceeds :

"It is understood, as above stated, that the parties hereto do not by these presents impair, affect, or novate their existing claims, and that in case of non-payment they will be entitled to enforce the judgments which may be held by them, and, furthermore, that the *original mortgages and privileges remain in full force and effect, and are not hereby novated*, and, if need be, for the purpose of avoiding all doubt the said privileges and mortgages are hereby recognized as operating on the said property *in the proportions aforesaid* and to secure the debts aforesaid, with the rank above stated.

"The mortgage of the said Barnsley and the bank results from an act executed before the undersigned recorder on 24th February, 1860, inscribed in this office on the same day, as will more fully appear by suit No. 578, entitled *Bank of New Orleans v. Tucker Brothers*, and No. 793, entitled *Godfrey Barnsley v. Tucker Brothers*, on file in the Third District Court of Lafourche."

This agreement was recorded in the book of conventional mortgages on the day of its date, 7th September, 1867.

Pursuant to the sale and adjudication of the 7th September, the sheriff on the 9th September made a deed to Cummings, in which he recites all that he had done touching the sale, and copies his return in full. He then proceeds to "sell, set over, transfer, and convey unto the purchaser, A. W. Cummings, for the sum above stipulated *and paid* as aforesaid, all the rights, title, and interest which defendants, Tucker Brothers, had in or on the aforesaid property."

The sheriff treated the sale as having been made for cash, and reserved no mortgage on the property. The deed was registered on the 30th September in the book of conveyances.

In December, 1868, Cummings sold the property to Mrs. Tucker, who assumed to pay the debts for which Cummings had bound



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Adams v. Daunis.

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himself; and on the same day she sold half of it to Thomas J. Daunis, with whom she formed a planting partnership. Daunis assumed the same debts, but neither he nor Mrs. Tucker gave any mortgage to secure the payment.

On the 2d of April, 1870, Daunis and Mrs. Tucker mortgaged the property to John I. Adams & Co., and on the 1st of April, 1871, Mrs. Tucker sold her half to Daunis, who assumed all the debts for which she had bound herself, but he gave no mortgage to secure the payment.

On the 25th of July, 1875, Adams & Co. required the recorder to cancel and erase the inscription of the conventional mortgage of the 24th of February, 1860, on the ground that more than ten years had elapsed after the date of this inscription when they on the 2d of April, 1870, acquired their mortgage on the property, and this inscription had not been renewed.

The recorder complied with this demand, as he was bound to do by the act of 1843 (Revised Statutes, §§ 450, 3141), amending article 3333, now article 3369, of the Civil Code; and on the 28th of July Adams & Co. proceeded against Daunis on their mortgage by seizure and sale. The property was sold on the 2d of October, 1875, and the mortgagees became the purchasers for some \$17,519, less than half the mortgage debt due them. The sheriff refused to complete the adjudication without payment of certain mortgage claims against Tucker Brothers, among others that of the Bank of New Orleans, resulting from the judgment recorded on the 28th of June, 1867.

Adams & Co. then took a rule on the recorder; N. W. Casey, receiver of the New Orleans National Banking Association, the successor of the Bank of New Orleans; Goodrich & Co., R. & E. L. Tanner, Gaubert and Richard, and the sheriff: the recorder and the several creditors to show cause why the mortgages appearing in the names of these creditors, respectively, in so far as they affect the property in question, should not be canceled and erased; and the sheriff to show cause why he should not complete the adjudication, and put the purchasers in possession.

Casey alone appeared and contested this rule. He pleaded want of jurisdiction; and that the proper and necessary parties were not before the court. He also pleaded a general denial; and set up the judgment against Tucker Brothers in favor of the Bank of New Orleans, recorded as a judicial mortgage on the 28th of

June, 1867, which he alleged had not been paid, and was in full force.

The judgment of the court below made the rule absolute, and ordered the recorder to cancel and erase the several mortgages specified in the rule, and in accordance with its terms; and the sheriff to complete the adjudication, and to put the purchaser in possession. From this judgment Casey took a devolutive appeal.

The plea to the jurisdiction is twofold: 1. That the National banks cannot be sued in a State court, except in the county or parish in which they are located. 2. That the rights of the bank cannot be determined on a rule, but only by direct action.

First. As to this latter objection, it suffices to say that in such a case as this the law requires the proceeding to be summary. Code of Practice, 754, 755; Rev. Stats., §§ 1942, 2903.

Second. The other plea to the jurisdiction is based upon section 57 of the National Bank Act, which was omitted in the Revised Statutes of the United States; but is to be found in the appendix, p. 1437, as an amendment to section 5198, as follows:

"Suits, actions, and proceedings against any association under this title may be had in any circuit, district or territorial court of the United States, held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

We do not understand this section as excluding all other jurisdictions than those specified. The State courts derive their jurisdiction from State law, not from the laws of the United States; and we must look to the State law to ascertain whether a State court has jurisdiction in any given case, except where exclusive jurisdiction is given to the Federal tribunals by the Constitution and laws of the United States.

Section 5136 of the Revised Statutes, section 8 of the National Bank Act, authorizes the banks "to sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons." That is, these banks are corporations, and they proceed and are proceeded against as other corporations. Once vested with this power and capacity, they are amenable to the jurisdiction of the courts of the States in which they are respectively located, just as other corporations or natural persons are; and section 57 of the Bank Act is merely declaratory, and was not intended as an abridgment of the power and jurisdiction of the State courts, touch-

ing property or persons, natural or corporate, within their territorial limits. Of course these corporations, just as natural persons, may have causes in which they are parties heard and determined in the Federal courts, either on original process or by removal in the cases provided by the laws of the United States.

In Louisiana the jurisdiction of the courts depends upon the subject-matter in controversy and the domicile of the defendant. The New Orleans National Banking Association had its domicile at New Orleans ; and, in an ordinary civil case, it could not have been sued out of the parish of Orleans. Casey, the receiver, has his domicile at the city of New Orleans ; and in like manner he is not subject to the ordinary jurisdiction of the courts of other parishes.

The association was not made a party to this proceeding. The Bank of New Orleans no longer exists. It was converted into the New Orleans National Banking Association in 1871, and Casey, receiver of that association, administered the effects which formerly belonged to the Bank of New Orleans. If the association were a party it would be amenable to the jurisdiction of any State court in which a natural person, having his domicile at the city of New Orleans, could be sued. The case cited by appellant's counsel, *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383 (*ante*, p. 77), simply decides that a National bank does not lose its corporate existence by the appointment of a receiver, and that it may still be sued, just as a natural person, in a court of the State, precisely as if a receiver had not been appointed.

The question in this case is not whether this National Banking Association may be sued in a State court after a receiver has been appointed ; but whether, a receiver having been appointed, he is amenable to the jurisdiction of a State court in a parish different from that in which the association was located, and in which also he has his domicile.

By the act of 1841, re-enacted in 1855, p. 497, § 37, and again in the Revised Statutes of 1870, §§ 1942, 2903 : " Whenever a conflict of privileges arises between creditors, all the suits and claims shall be transferred to the court by whose mandate the property was first seized, either in mesne process or on execution, and the said court shall proceed to class the privileges and mortgages according to their rank and privilege *in a summary manner* after notifying the parties interested."

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New Orleans National Bank v. Raymond.

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The whole controversy in this case is a conflict of privileges. The property was situated in Lafourche; it had been seized and sold under process of the District Court of that parish, and no other court in the State had power or jurisdiction to settle the controversy, and to distribute the proceeds of the sale among the several creditors asserting mortgages and privileges against the property. [The remainder of the opinion considers other questions.]

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## NEW ORLEANS NATIONAL BANK V. RAYMOND.

(29 Louisiana Annual, 355.)

*National bank may sell real estate and take mortgage.*

A National bank may sell real estate owned by it and take back a mortgage thereon to secure the payment of the purchase-money.

**A** PPEAL from the Fifth District Court, parish of Orleans.  
CULLOM J.

*Charles Louque and Carleton Hunt*, for Joseph Billgery, plaintiff in rule, and appellee.

*McGloin & Nixon*, and *Magruder & Richardson*, for Mrs. A. B. Baranco, appellant.

SPENCER, J. The Union National Bank of New Orleans sold to Joseph Raymond, by authentic act of date the 27th of February, 1873, a certain parcel of ground in the square bounded by First, Second, Dryades, and Baronne streets, for the price of \$14,666.66, one-fifth of which was paid in cash, and for the balance Raymond executed notes at one, two, three and four years, secured by special mortgage and pact of *non alienando* on the property.

On the 10th of April, 1873, Raymond entered into a contract with the city of New Orleans, acting through its mayor under ordinance No. 2041 administration series. By that contract Raymond bound and obligated himself in substance to erect on said grounds a market-house according to certain specifications; to free the property of all mortgages and incumbrances on or before the completion of said building, and to keep the market as required by

the city ordinances, etc. Raymond during the first ten years was to receive all the rents and revenues. At the expiration of the first ten years the city was for the next ten years to farm out the market and take all the rents and revenues in excess of five hundred dollars per month, or six thousand dollars per year; the rents up to said amounts to be paid to Raymond, his heirs or assigns. At the end of this second term of ten years, Raymond was to transfer the grounds and market in full ownership to the city, binding himself not to alienate or incumber the same to the prejudice of this agreement.

On the 10th of March, 1874, the New Orleans National Bank obtained judgment on a bill of exchange for seven hundred dollars against Joseph Raymond, issued execution thereon, seized, and, on the 24th of July, 1876, sold and purchased for one hundred and fifty dollars "all the right, title, and interest of Joseph Raymond in, to, and under the contract made with the city of New Orleans of date April 10, 1873." \* \* \* "The said act of April 10, 1873, conferring upon him the right to the revenues of a market constructed by him at the corner of Second and Dryades streets, in the square bounded by Second, First, Dryades and Baronne streets, for the term of twenty years," etc.

On the 5th of September, 1876, said New Orleans National Bank sold and transferred, in consideration of the amount due it, with subrogation, to Mrs. Baranco, all its rights in, to and under said judgment and purchase.

On the 25th of May, 1876, the Union National Bank, under executory process against Raymond upon said vendor's mortgage, seized the above described lots of ground, "together with all the buildings and improvements thereon," and advertised the same for sale on the 1st of July, 1876.

On June 29, 1876, Joseph Billgery purchased and was subrogated to the judgment in the case of "*Andrew G. Downey v. Joseph Raymond*," for some twelve hundred and fifty dollars, being for work done on said market buildings.

On the 1st of July, 1876, the day of sale, Joseph Billgery paid to the Union National Bank the mortgage note due, and the sale was not made. Subsequently he took up and paid the remaining outstanding vendor's note held by the Union Bank. Billgery did not take a formal act of subrogation at the time of his payment on the 1st of July, but on the 2d of August, 1876, the bank gave him a receipt and subrogation to its rights.

Billgery, as subrogee of Union National Bank, caused said property to be re-advertised for sale on February 10, 1877, and re-advertised again for sale on March 3, 1877.

On the 24th of February, 1877, he commenced the proceeding now before us, being a rule taken on Mrs. Baranco to show cause why the act of adjudication by the sheriff to the New Orleans National Bank above described (to which she had been subrogated) should not be erased and canceled from the books of the office of conveyances, for the reason that the same is null and void and operates injuriously to him (Billgery) as a cloud upon the title of said property.

Mrs. Baranco pleads by way of exception and answer in substance as follows :

First. That plaintiff in rule, not being a party to the suit of *The New Orleans National Bank v. Joseph Raymond*, cannot proceed in this summary manner to set aside the adjudication, and should proceed by direct action.

Second. That the pretended mortgage to the Union National Bank is void, as taken in contravention of the laws of the United States, creating National banks; that said bank under said laws is prohibited from owning real estate and from taking or holding mortgages thereon under the circumstances of this case.

Third. That the mortgage to the Union National Bank has been extinguished by payment, and that said Billgery was not subrogated thereto.

Fourth. She alleges her ownership of the rights of Raymond under the said contract with the city, and that she is entitled thereby to the rents and revenues of said market in the hands of the sheriff.

Fifth. By way of reconvention she prays and demands the nullity of Billgery's pretended mortgage rights and for their cancellation, and that she be declared entitled to the revenues of said market.

Upon these issues the case was tried. There was judgment for plaintiff ordering the erasure and cancellation of Mrs. Baranco's title, and decreeing its nullity. She prosecutes this appeal.

[The court here decided a question of practice.]

It therefore only remains for us to inquire whether Joseph Billgery shows an interest in having this done.

He claims to be subrogee of the vendor's mortgage held by the

Union National Bank. If that be a valid mortgage and he be the holder of it, his demand is well founded.

Counsel for defendant in the rule urges strenuously that the mortgage in favor of the bank was in its inception null and void, as violative of the National Bank Act. He admits that the bank was the owner of the lots in question, but contends that it could not sell them on a credit, reserving a mortgage and privilege for the price, and that such mortgage and privilege were absolutely void. The 28th section provides as follows:

“And be it further enacted, That it shall be lawful for any such association to purchase, hold, and convey real estate as follows :

“First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

“Second. Such as shall be mortgaged to it in good faith for debts previously contracted.

“Third. Such as shall purchase at sales under judgments or decrees or mortgages held by such association, or shall purchase to secure debts due to said association.

“Such association shall not purchase or hold real estate in any other case or for any other purpose than as specified in this section,” etc.

As stated, there is no dispute as to the bank having been owner of the lots, and therefore it must have acquired in some one of the modes specified in the act. The act gives authority to *purchase* under certain *restrictions*, but there is no restriction upon the power “to convey.” The intent and policy of the law is manifest. It was to discourage, to prevent, the accumulation of real estate in the hands of these banks. But if such was the intent, it would be strange if the power and right “to convey,” to sell, were restricted. We would expect the largest liberty in this direction, as being in furtherance of purposes of the lawgiver. It is unreasonable to conclude that because the law gives the power to do business “by loaning money on personal security,” and restricts the right to purchase real estate, that therefore it forbids the sale of such real estate as may have been lawfully acquired upon the usual customary terms of the commercial world, and strikes with nullity such vendors’ liens and mortgages as may be retained to secure deferred parts of the price. If defendant’s theory be right, then a National bank in Louisiana cannot sell real estate on a credit at all, even without mortgage, for under our law the vendor has for his security, by mere operation of law, both his lien and the right of resolution of the sale, which would constitute *real* securities for debt in vio-

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lation of the Banking Act. We conclude therefore that there is nothing in the law preventing a National bank from selling its real estate on terms of credit and reserving a mortgage to secure the price.

The remaining question is, was Billgery subrogated to the bank's mortgage? It is unnecessary to discuss the effect of the receipt and conventional subrogation given to him by the bank on the 2d of August, 1876. He was a creditor of Raymond on the 29th of June, 1876, by subrogation to the judgment of Andrew G. Downey. He paid the mortgage note to the bank on the 1st of July, 1876. Subrogation took place by effect of law. C. C. (old) 2157.

There is no proof that Billgery acted as Raymond's agent; that is satisfactory. It is conceded on all sides that it was Billgery's money that was paid, and the weight of evidence is largely in favor of his having done so in his own interest and behalf.

It is therefore ordered, adjudged, and decreed by the court that the judgment appealed from be affirmed with costs of both courts.

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STETSON V. CITY OF BANGOR.

(56 Maine, 274.)

*Taxation of National banks — State statute prohibiting banking companies.*

Municipal officers cannot assess a tax on shares of stock of a National bank unless authorized by a law of the State.

A statute authorizing "the taxation of all shares in moneyed corporations," held sufficient authority to tax shares in National banks.

A State statute prohibiting the establishment of banking companies in the State, without authority of the Legislature, does not apply to National banks.

**A**SSUMPSIT to recover back taxes assessed April 1, 1864, on plaintiff's shares in a National bank organized under the National Currency Act of 1863.

*Rome & J. A. Peters, for plaintiff.*

*A. W. Paine, for defendants.*



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DICKERSON, J. [After deciding that the shares in banks organized under the Currency Act of 1863 could be taxed by the State.]

Before, however, municipal officers can rightfully assess a tax upon the shares of National banks, they must be authorized so to do by some law of the State. They are the creatures of State law, and derive their powers in this respect solely from State enactments.

Though the shares in National banks are not specifically mentioned in our Tax Act, we think they are included in section 5, chapter 6, of R. S., "which authorizes the taxation of all shares in moneyed corporations." Sections 79 to 82, of chapter 47, R. S., prohibiting the establishment of banking companies in this State without authority of the Legislature, were not intended to apply to banking corporations created by authority of Congress, since such corporations may be legally established in the State without the consent of the Legislature.

According to the agreement of the parties the

*Nonsuit must be confirmed.*

CUTTING and BARROW, JJ., concurred.

KENT and TAPLEY JJ., concurred in the result.

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### WELD V. CITY OF BANGOR.

(59 Maine, 416.)

#### *Tax on National bank shares, how collected.*

The plaintiff, a non-resident of Bangor, was duly assessed therein, upon his shares of stock in the First National Bank. After legal demand, the plaintiff, refusing to pay the tax upon the warrant of the collector of the city, issued April, 1870, was duly arrested by the sheriff of the county in the following May, for the tax, which the plaintiff then paid under protest, together with costs, to the officer, and he to the city treasurer. In assumpsit to recover the money thus paid, *held*, (1) that the collection of such tax is to be enforced in accordance with the general law; and (2) that chapter 209 of the Public Laws of 1868 related exclusively to the assessment, and in nowise affected the collection of taxes duly assessed under previously existing laws.

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**A**SSUMPSIT for money had and received.

The plaintiff, during no part of the last twenty years, has been a resident of Bangor or had any property taxed there, except in 1867, when, without his consent, he was, in due and legal form, assessed there upon his shares of stock in the First National Bank, a banking institution established under the laws of the United States, located in Bangor.

After legal demand upon him, the plaintiff, refusing to pay the tax upon the warrant of the collector of the city issued in April, 1870, was duly arrested by the sheriff of Penobscot county on May 26, 1870, for the tax, when he paid it, under protest, together with costs of arrest to the sheriff, who paid it to the city treasurer. The action is to recover the money thus paid, and if not maintainable, the plaintiff to be nonsuit.

*J. A. Peters and F. A. Wilson, for plaintiff.*

*H. C. Goodenow, city solicitor, for defendants.*

APPLETON, C. J. The tax in question was duly and legally assessed under the provisions of the act of 1867 (ch. 126). *Packard v. Lewiston*, 55 Me. 456; *Abbott v. Bangor*, 56 id. 310.

The collection of this tax, like that of all other taxes duly assessed, is to be enforced in accordance with the general laws of the State on that subject.

The act of March 6, 1868 (ch. 209), relates exclusively to the assessment of taxes. The rules prescribed vary from those of the act of 1867 (ch. 126). The act is prospective in its operation. It looks only to the future. "All acts and parts of acts inconsistent with this act are hereby repealed." That is, a new rule as to the future assessment of taxes is established, nothing more.

The act in no way affects the collection of taxes, which have been duly assessed under previously existing law. It does not prohibit the enforcement of a tax as in *Augusta v. North*, 57 Me. 392. It in no way alludes to the collection of taxes.

Had the tax been paid as in *Abbott v. Bangor*, 56 Me. 310, its repayment could not have been enforced. The tax being duly assessed, and constituting a portion of what the plaintiff was equitably

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bound to pay toward the public burdens, it can hardly be supposed that the Legislature intended to relieve him from a just liability. By a long neglect to pay his taxes, the plaintiff is not to be in a better condition than if he had promptly done his duty.

*Plaintiff nonsuit.*

## HAGAR V. UNION NATIONAL BANK.

(63 Maine, 509.)

*Lien of National bank on dividends—Attachment of shares—Demand of dividend.*

A National bank has a lien on and the right to hold a cash dividend as pledge for the indebtedness of the shareholder to the bank.

A National bank may attach the shares of a stockholder therein for his debt due the bank.

A National bank sued a shareholder therein for money due and attached his shares. Pending the suit he demanded payment of the dividends declared upon the attached shares, which was refused. He afterward settled the suit and brought an action for his dividends, without renewing his demand. *Held*, that the demand while the shares were attached was a nullity, and as dividends were not payable until demanded, the action could not be maintained.

**A**CTION of assumpsit to recover dividends declared by the defendant, a National bank, on forty-five shares of stock owned by the plaintiff.

Prior to the time such dividends were declared the bank had sued the plaintiff upon two notes due from him to the bank and had attached his shares of stock. After the dividends were declared, but while the suit was pending, the plaintiff demanded the dividends and they were refused. He subsequently settled the suit and then brought this action, without having renewed his demand for the dividends. One of the dividends was earned but not declared before the attachment of the share.

*J. W. Spaulding*, for plaintiff.

*J. H. Drummond*, for defendant.

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VIRGIN, J. There are two fatal objections to the maintenance of this action :

I. A bank has the right to hold a cash dividend as pledged for the indebtedment of the shareholder to the bank.

It has been expressly decided in the Supreme Court of the United States, that since the National Bank Act of June 3, 1864, went into effect, neither by the act itself, nor by any by-law based upon any authorized provision in the "articles of association," can a National bank create a lien upon the shares of its stockholders for their indebtedment to the bank. That such a lien is contrary to the whole policy of the act is manifested by the repeal of such a provision in the act of 1863, and inconsistent with the spirit of section 35 in the act of 1864. *Bank v. Lanier*, 11 Wall. 369 (*ante*, p. 70) ; *Bullard v. Bank*, 18 id. 589. See, also, *Evansville Nat. Bank v. Metropolitan Nat. Bank*, 2 Biss. 527 (*ante*, p. 189). To the same purport is *Bank of Louisville v. Bank of Newark*, 10 Bush, 367.\*

The rule has long prevailed in many jurisdictions that a corporation has no implied lien on the shares of its stockholder for debts due from him and cannot hold them against a purchaser or attaching creditor (*Sargent v. Franklin Ins. Co.*, 8 Pick. 90 ; *Mass. Iron Co. v. Hooper*, 7 Cush. 187) ; but that a bank deals with its stockholders in the same manner as it does with its general customers, taking the same security and not relying upon its stock. A different rule was adopted in relation to dividends declared. They were considered as so much money in the possession of the bank belonging to the stockholder, but which should be considered as pledged toward the payment of any just debt then due from him. *Bates v. N. Y. Ins. Co.*, 3 Johns. Cas. 238. This rule was considered a "reasonable one," and was adopted by the court in *Sargent v. Franklin Ins. Co.*, *supra*. We fail to perceive any real objection to such a rule. It is not inconsistent with any provision in the Bank Act, and neither is it in conflict with any principle of public policy. It cannot affect the free sale and transfer of shares, for the dividend does not pass with the transfer of the share, being the property of him who is the shareholder when it is declared. So long, then, as the

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\* The following is all that is said in this case on the subject :

"The claim of the Louisville Bank to a lien on the stock under and by virtue of its articles of association or by-laws cannot be maintained. This question is settled beyond all controversy by the two cases of the *Bank v. Lanier*, 11 Wall. 369, and *Bullard v. Bank*, 18 id. 589. No banking association organized under the National Currency Act of 1864 can create or hold such liens."

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plaintiff's overdue notes remained unpaid, he could not recover the dividends declared upon his shares, because of this equitable lien.

And neither could he maintain an action therefor without a previous demand. *Scott v. Cent. R. R. Co.*, 52 Barb. 45. The law does not require a bank, after declaring its dividends, to hunt up and tender to its stockholders their respective dividends, in order to avoid the liability of actions therefor. Dividends are usually declared payable at the banking-room, whither the owner may go and there on demand receive them—provided his indebtedment to the bank does not contravene. To be available the demand should have been made when and where the bank was bound to pay. If made while the money was considered as pledged for the indebtedment of the demander, it would be as useless as if made before the dividends had been declared. As well might a mortgagor of chattels demand them before he had discharged the debt secured thereby, and after payment bring his action without renewing his demand. In the case at bar the plaintiff, after dissolving the lien by payment of his notes, could doubtless have obtained the dividends by asking for them at the banking-room; but, for some reason, he chose to sue without any other demand; and we think his action was prematurely commenced. *Hagar v. Randall*, 62 Me. 439.

II. It had a special lien created by the attachment of his shares on June 21, 1872, which continued until July 10, 1873, when the attachment was dissolved.

The net profits of a bank remain the property of the bank and are inseparable and undistinguishable from it, and will pass by the name of stock by sale, bequest or levy, until by the resolution of the directors, they are separated and set apart as dividends. This almost necessarily results from the utter impracticability of ascertaining the real circumstances of the bank until the expiration of the full period for which they are declared; and when declared they become the property of the then stockholders. *Goodwin v. Hardy*, 57 Me. 143; *March v. Eastern R. R. Co.*, 43 N. H. 515; *Foote*, appellant, 22 Pick. 299; *Granger v. Bassett*, 98 Mass. 469; *Minot v. Paine*, 99 Mass. 101.

Shares are a peculiar property, but are declared by all modern charters to be personal property. The title is a legal one, created and defined by law, and it may be transferred by contract, bequest or levy. The mode for securing a lien thereon and passing the title by levy is expressly provided by our own statute, as follows:

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“When the share or interest of any person in any incorporated company is attached on mesne process, an attested copy of the writ with a notice thereon of the attachment, signed by the officer, shall be left with the clerk, cashier or treasurer of the company ; and such attachment shall be a lien on such share or interest, and on all accruing dividends.” R. S., ch. 81, § 25.

The attachment was perfected in strict compliance with this provision. We can hardly conceive of a better “notice” of an attachment than an attested copy of the officer’s return of the attachment, indorsed upon an attested copy of the writ. The attachment being valid, it created a lien on the shares “and on all accruing dividends,” *i. e.*, all dividends declared on such shares during the continuance of the attachment regardless of the time when the acquisitions out of which they are declared may have accrued. In perfect accord with this view, the statute further provides that “if such shares were attached in the suit in which the execution issued,” the purchaser at the sale on execution “shall have all dividends which accrued after the attachment.” R. S., ch. 84, § 15.

The plaintiff invokes section 35 of the Act of Congress of 1864 (13 Stat. at Large, 102), *viz.* : “That no association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser nor holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith ;” and contends that this provision forbids the attachment by the bank of any shares of its own capital stock, “unless it shall be necessary to prevent loss,” etc. We do not understand that the attachment or sale on execution of shares implies a purchasing or holding on the part of the creditor. Shares are personal ; and any person may purchase at the sale. If, like a levy on real estate, the title necessarily passed to the creditor, the construction contended for by the plaintiff would be much strengthened. But although, to use the language of Mr. Justice DAVIS, in *Bank v. Lanier*, *supra*, “so marked is the policy of Congress on this subject, that it does not allow a bank to become the purchaser or holder of its shares at all, unless absolutely necessary to prevent loss on a debt,” etc., and “that if the power were given to a bank to loan money on the security of its shares, it would imply a power to become the owner of those shares, and this Congress intended to guard against,” we are not

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prepared to believe that Congress intended to require a bank to go out and accurately inform itself of the necessity before it can by the forms of law attach the shares of a stockholder for his debt due the bank and sell them to whomsoever may purchase.

If the defendant did have a lien on the shares by reason of the attachment, then the demand will not avail the plaintiff in the maintenance of this action. *Plaintiff nonsuit.*

APPLETON, C. J., CUTTING, DICKERSON, BARROWS AND DANFORTH, JJ., concurred.

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STATE V. THE NATIONAL BANK OF BALTIMORE.

(33 Maryland, 75.)

*Conversion of State bank into National bank—Right of State to exact bonus.*

A State bank was by its charter required to pay the State a tax or bonus on its capital paid in. A statute afterward authorized State banks to reorganize as National banks, provided that all sums required by their charters to be paid to the State continued to be paid as theretofore. *Held*, that a State bank had the right to surrender its charter, and by so doing discharged itself from its obligation to pay the required bonus, and that the State could not require it, in reorganizing as a National bank, to pay any bonus.

THIS suit was instituted by the appellant in accordance with the requirements of Resolution No. 4, of the General Assembly of Maryland of 1868, to recover certain sums of money claimed to be due and payable by the appellee, under the acts of Assembly of 1853, chapter 441, and 1865, chapter 144, for the augmentation of the free school fund of the State.

*Attorney-General Jones*, for appellant.

*L. Nevett Steele*, for appellee.

MAULSBY, J., delivered the opinion.

The act of 1853, chapter 441, rechartered several of the banks of this State whose charters were about to expire, and amongst

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others the Bank of Baltimore, since converted into a National association under the act of Congress of 1864, chapter 106.

The 5th section of the act of 1853 provided that each of the banks should annually pay to the treasurer of the State of Maryland, on the first Monday of January, the sum of twenty cents on every hundred dollars of the capital stock actually paid in, to be applied in augmentation of the free school fund, and that, if any of said banks failed to make said payment within six months after it became payable, its charter should be forfeited, and be deemed null and void.

The 17th section did not provide a mode in which the banks, or any of them, should evidence a determination to close banking operations, or a particular means by which said operations should be closed, and the assets distributed, as seemed to be supposed in the argument of the Attorney-General; but provided simply, that if the president and directors, or a majority of the stockholders in general meeting assembled, should, *at any time*, determine to close the banking operations of any of said banks, it should not be lawful for such corporation *thereafter* to resume the exercise of its banking powers and franchises.

There is no provision of the act of 1853 restraining any of the banks incorporated by it from ceasing to exercise the powers and franchises conferred by it, at any time when the president and directors, or a majority of the stockholders, might so determine. On the contrary, the 17th section expressly recognizes the right to do so, at any time during the corporate existence authorized by the act.

The Bank of Baltimore availed of the rights and franchises granted, and assumed the obligation to pay twenty cents on every hundred dollars of its capital stock paid in annually, so long as it should continue its existence under the authority of the act. The franchise granted was to conduct banking operations. All other provisions of the act were incident to the exercise of this franchise. The right of "closing its banking operations" necessarily pertained to the corporation, from the nature of its being, and, as stated, was recognized by the 17th section.

The bank was in existence under the authority of the act of Assembly of 1853, when the act of Congress of 1864 was passed. The latter act was passed "to provide a National currency, secured by a pledge of United States bonds, and to provide for the re-



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demption and circulation thereof." It proposed to effect this by means of authorizing associations to be organized "for carrying on the business of banking." The 5th and following sections, to 43d inclusive, provided in detail for the means and the manner in which they were to be applied. The 44th section provided, "that any bank, incorporated by special law, or any banking institution organized under a general law of any State, may, by authority of this act, become a National association under its provisions," and proceeded to detail the manner in which a banking institution might become organized as a National association, as in the preceding sections the manner had been detailed in which persons might organize for the same purpose.

The power of Congress to pass the act of 1864 is not made a question in this case, which is against a defendant existing under its authority, and we are, therefore, relieved of the duty of expressing an opinion on that subject. In this opinion, we must assume the constitutionality of all those parts of the act of 1864 which are necessarily involved in the decision of the case before us. It provided full and perfect means by which to enable the Bank of Baltimore to become changed and converted into a National association.

The record shows that, on the 13th of July, 1865, the owners of the capital stock of the Bank of Baltimore organized an association under the act of Congress, and determined to conduct their business, from and after the 1st day of August, under the title of the National Bank of Baltimore, and that on the 17th day of July the Governor of the State, by his proclamation, announced that the charter of the Bank of Baltimore, as granted by the General Assembly, had been surrendered, and that its corporate powers, under said charter, would thenceforth cease.

The charter being surrendered and annulled, on what ground can the State demand the price which was payable whilst the charter continued, for the privileges granted by it?

"The bonus imposed by the charter of banks is not a tax on the franchises granted, but a price to be paid for the right of exercising the powers, and enjoying the immunities conferred by the charters." 6 Gill, 288.

This suit is against the National Bank of Baltimore, to recover the bonus imposed by the act of 1853, on the Bank of Baltimore, which has accrued and become payable, as alleged, since the change

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and conversion of the Bank of Baltimore into The National Bank of Baltimore.

The right to recover is not, and could not be maintained on the ground that the State is entitled to the price to be paid by the Bank of Baltimore for the right of exercising the powers and enjoying the immunities conferred by its charter. That has been surrendered and annulled. The right to recover is vested on the ground of contract, and it is contended that, by the act of Assembly of Maryland, of 1865, chapter 144, the Bank of Baltimore was *enabled* to abandon its charter, and avail of the provisions of the act of Congress, and to continue "to use its corporate name for the purpose of prosecuting and defending suits instituted by or against it, and of enabling it to close up its affairs," and to have all its assets, real and personal, vested in the association organized under the act of Congress, without other transfer, on condition "that the existing laws of the State providing for taxes on the State banks, for the purposes enumerated therein, shall extend and apply to all State banks and other institutions, availing themselves of the provisions of this act, when they shall have become banking institutions under the act of Congress, and all sums required by the charter of said institutions and banks to be paid to the State, shall continue as heretofore to be paid."

The money sued for was payable to the State under the act of 1853, as a price for the right of exercising the powers and enjoying the immunities of the State charter. When that charter was surrendered and annulled, the money could no longer be payable for that right. If the duty of continuing to pay it could be imposed on the new association created by the act of Congress, and existing under its authority, it could only be by virtue of power in the State to impose it as a tax. It is clear that it could be demanded only as payment for a right granted by the State, or as a tax imposed by the State. It is clear that the State had no power to impose it as a tax.

In *McCulloch v. The State of Maryland*, 4 Wheat. 316, the Supreme Court said: "The State governments have no right to tax any of the constitutional means employed by the government of the Union to execute its constitutional powers," and "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control the operations of the constitutional

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laws enacted by Congress to carry into effect the powers vested in the National government.”

And in *Howell v. State*, 3 Gill, 14, our own Court of Appeals said: “State sovereignty extends to every thing which exists by its own authority, or is introduced by its permission, but not to those means employed by Congress to carry into execution powers conferred by the Constitution of the United States.”

The prayers of the plaintiff below rested on the ground of contract, and were addressed to the point, that it ought to be left to the jury, on all the facts and circumstances of the case, to find an implied agreement by the defendant to pay the money sued for. It could not be competent to the jury to find an implied contract by the defendant to pay to the State a bonus for the privileges and franchises of defendant’s charter. No charter from the State was in existence. The defendant derived the franchises and privileges which it enjoyed from the act of Congress. It would have been contrary to law for the jury to so find. So, it could not be competent for the jury to infer a promise by defendant to pay to the State a tax which the State had no right to demand. The attempt by the State to impose such a tax would be void, and there could be incumbent on the defendant no duty to pay it, on which a promise to pay could be raised by implication. In no view do we think that the jury could have been justified in finding a contract by the defendant on which the action could have been maintained, and we, therefore, concur with the court below in the propriety of rejecting the appellant’s prayers.

*Judgment affirmed.*

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THE CHESAPEAKE BANK, appellant, v. THE FIRST NATIONAL  
BANK OF BALTIMORE.

(40 Maryland, 289.)

*National banks — Mesne process against, from State court.*

The act of Congress providing that no attachment, injunction or execution shall be issued against a National bank, before final judgment, in any action in a State court, is constitutional.

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ATTACHMENT on warrant against the First National Bank of Baltimore, as garnishee of the First National Bank of Washington. The opinion states the case.

*George H. Williams*, for appellant.

*A. Sterling, Jr.*, for appellee.

MILLER, J. The appellant on the 18th of September, 1873, caused an attachment *on warrant* to be issued out of the Superior Court of Baltimore city to affect the property and credits of the First National Bank of the city of Washington, District of Columbia, as a non-resident debtor, which was laid in the hands of the First National Bank of Baltimore, as garnishee. In October following, the garnishee filed a motion to quash for reasons alleged, and from the judgment of the court quashing the writ, this appeal is taken. It is conceded the decision of the Superior Court was based upon the first reason stated in the motion, as follows :

That said First National Bank of Washington was, before said attachment and at the time of the issue thereof, and still is, an association for the purpose of carrying on the business of banking, duly organized under the act of Congress of June 3, 1864, and that, by the 2d section of the act of Congress, approved March 3, 1873, it is enacted that the 57th section of the first-mentioned act be amended by adding thereto the following : "That no attachment, injunction or execution shall be issued against such association or its property before final judgment in any such suit, action or proceeding in any State, county or municipal court," and that, by the force of said section, of said acts, the said attachment is illegal and void.

We shall not stop to inquire what is the true construction of the original 57th section of the act of 1864, because it is clear the case before us is embraced by the terms of the amendment thereto made by the act of 1873. The constitutionality of the National Banking Acts is admitted, their purpose being, as expressed in the title to the original act of 1864, "To provide a National currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof ;" but it is insisted these particular provisions, or features of them, are unconstitutional and void. The argument is that it is not within the power of Congress to

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clothe these banking associations as to their contracts and dealings with the world, with any special immunities and privileges exempting them, in their trade and intercourse with others, from the laws and remedies applicable in like cases to other citizens. But the power to create these banks as instrumentalities of the government, being, as it confessedly is, within the rightful powers of Congress, we cannot say that provisions like these, defining in what tribunals they shall be sued and to what suits or actions they shall be subjected, are not appropriate and necessary to carry out this admitted power. It must plainly appear that such provisions are inappropriate and unnecessary for this purpose, in order to justify a court in declaring that Congress has transcended its authority in enacting them. In our opinion Congress has the power to make any provisions which tend to promote the efficiency of these banks in performing the functions by which they were designed to serve the government, and to protect them, not only against interfering State legislation, but also against suits or proceedings in State courts by which that efficiency would be impaired. We are unable to perceive that the provisions here assailed are not of that character, and therefore cannot pronounce them void.

*Judgment affirmed.*

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WECKLER v. THE FIRST NATIONAL BANK OF HAGERSTOWN.

(42 Maryland, 581.)

*National bank — Ultra vires — When not liable for representations of officer.*

Selling railroad bonds upon commission is not within the scope of the corporate powers of a National bank ; and therefore no action lies against such corporation for false representations made by its teller to induce the plaintiff to buy bonds.\*

**A**CTION to recover damages for fraudulent representations made by defendants' teller upon sale of bonds to plaintiff.

*H. H. Keedy*, for appellant. This is an action for deceit. Whether

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\* See *Wiley v. First National Bank of Brattleboro*, post, and note.

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an action of this kind can be maintained against a private corporation is no longer an open question. *Tome v. Parkersburg Branch R. R. Co.*, 39 Md. 70; *Merchants' Bank v. State Bank*, 10 Wall. 644; *Barwick v. Eng. Joint Stock Bank*, L. R., 2 Exch. 259; *Swift v. Wintherbotham*, L. R., 8 Q. B. 244; *Phil., Wil. & Balt. R. R. Co. v. Quigley*, 21 How. 202.

The instruction of the court is clearly erroneous, independent of the fact that it goes upon the assumption that the transaction complained of was a purchase and sale of these bonds, which the facts in the case do not warrant, it lays down the broad proposition that the purchase and sale of bonds are not within the chartered powers of a National bank. It has long been established by the American courts, that the bonds of railroads, as well as State and municipal bonds, made payable to bearer or holder, are negotiable instruments—commercial paper. *White v. Vermont and Mass. Railway Co.*, 21 How. 575; *Mercer County v. Hackett*, 1 Wall. 95; *Gelpcke v. Dubuke*, id. 206; *Aurora City v. West*, 7 id. 105; *City of Lexington v. Butler*, 14 id. 295; *White v. Railroad*, 21 How. 576; *Thomson v. Lee County*, 3 Wall. 331.

The ruling of the court is then reduced to this, that the purchase and sale of negotiable instruments, or negotiable evidences of debt, are not within the chartered powers of a National bank. The National Banking Act, section 8, says: "Shall exercise under this act all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt, by receiving deposits, by buying and selling exchange, coin and bullion." To discount, signifies the act of buying a negotiable instrument for a less sum than that which, upon its face, is payable, and to negotiate means "to sell, to pass, to transfer for a valuable consideration; as to negotiate a bill of exchange." (See Bouvier's Law Dictionary, *Discount*, and Webster's Dictionary, *Negotiate*.) Giving these meanings to these words, the ruling of the court below was in direct conflict with the very words of the statute. What can be meant by "*other evidences of debt*," if it does not refer to the class of securities under consideration?

If it is lawful for National banks, under any circumstances, to sell bonds, the defense of *ultra vires* will not be available.

It will not be controverted that a National bank can invest its own funds in bonds of the class in question; that if it becomes tired of

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the investment or finds it unprofitable, it can sell these bonds and buy others, in other words, can change its investments. Nor will it be denied that if, at one season of the year, its funds are more than sufficient to supply the demands of its customers, it could purchase bonds ; and at another season of the year, when the wants of its customers increase, could sell them. It has been decided by this court in *First National Bank of Charlotte v. National Bank of Baltimore*, 39 Md. 600,\* that a National bank could legitimately even become possessed of stocks and sell them ; and if it could own stocks under certain circumstances, it could surely, under similar circumstances, own bonds and sell them ; and again, it is usual for banks to loan money with bonds as collateral security, and upon default in payment, to sell such bonds. The law applicable to this branch of the case is well settled.

If the contract can be valid under any circumstances, an innocent party has a right to presume its validity, and the corporation is estopped from denying it. The appellant in this case was an innocent party; at the time of the transaction she was not made acquainted with the circumstances under which the appellee was selling these bonds; the words used by the officers were, “ *we can give you better bonds.*” *Miner’s Ditch Co. v. Zellerbach*, 37 Cal. 543; *Merchants’ Bank v. State Bank*, 10 Wall. 644 (*ante*, p. 47); *Rashdell v. Ford*, L. R., 2 Eq. Cas. 750; *Houghton v. First National Bank of Elkhorn*, 26 Wis. 662; S. C., 7 Am. Rep. 107; *North River Bank v. Aymar*, 3 Hill, 262.

The buying and selling of bonds by a National bank is not *ultra vires*. It is a fact known to all persons, that National banks, from their organization, have been engaged in the sale of government and other bonds. They have advertised them; their windows have been filled with *fac similes* of them — and every means has been employed to give the public notice that such was a part of their business. It is not necessary that the act of incorporation should give a bank particular power to do an act, to enable it to do it, for if so, its movements, for all practical purposes, would not last for a day. It is sufficient if it is the ordinary course of banking business. *Bank of Kentucky v. Schuylkill Bank*, Parsons’ Sel. Cases, 227.

In the face of an usage so broad and general, it would be a harsh rule to declare a transaction illegal or *ultra vires*, which had been entered into in good faith. Happily we are not without authority

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\* Affirmed by the Supreme Court of the United States, see *ante*, p. 124.

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upon this question, for it has been directly settled by several decisions. *Caldwell v. The National Mohawk Valley Bank*, 64 Barb. 333; *Van Leuven v. First National Bank of Kingston*, 54 N. Y. 671 (*post*), and 6 Lans. 373; *Leach v. Hale*, 31 Iowa, 70 (*ante*, p. 466.), *Matthews v. The Mass. National Bank*, 1 Holmes, 396; *Foster v. Essex Bank*, 17 Mass. 496.

*Albert Small* and *George Schley*, for appellee. Two questions only are involved in this issue. First. Does an action of *deceit* lie against a corporation? and Second. Conceding the facts alleged, and that the action will lie, is the appellee liable, the acts complained of being clearly *ultra vires*.

1. An incorporated company cannot, in its corporate character, be called on to answer in an action for deceit. *Western Bank of Scotland v. Addie*, L. R., 1 H. L. Sc. 145. The only late case in conflict (*Swift v. Winterbottom*, P. O., L. R., 8 Q. B. 244) is expressly overruled on appeal to the Exchequer Chamber in same case *sub nom.*, *Swift v. Jewsbury*, P. O., L. R., 9 Q. B. 301. See Benjamin on Sales, B. 3, ch. 2, § 3, pages 336-350, and 8 Am. Law Rev. 631-648.

2. The acts complained of are *ultra vires*, and the appellee cannot be bound by any act or representation of its officer in this behalf. *Tome v. Parkersburg Branch Railroad Company*, 39 Md. 36; Penn., *Del. & Md. Steam Navigation Company v. Dandridge*, 8 Gill & J. 248; *Duncan v. Maryland Savings Institution*, 10 id. 299; *U. S. v. City Bank of Columbus*, 21 How. 356; *Merchants' Bank v. Marine Bank*, 3 Gill, 125; *Minor v. Mechanics' Bank of Alexandria*, 1 Pet. 46; *Head v. Providence Ins. Co.*, 2 Cranch, 127, 169; *Dartmouth College v. Woodward*, 4 Wheat. 518; *Bank of the U. S. v. Dandridge*, 12 id. 64.

*Banking*, apart from the very elaborate definition given in the act of Congress, is defined in *Duncan v. Maryland Savings Institution*, *supra*, as "consisting of the right of issuing negotiable notes, discounting notes and receiving deposits," citing *The People v. The President, etc., of the Manhattan Co.*, 5 Conn. 383; *The People v. The Utica Insurance Co.*, 15 Johns. 390. And see Angell & Ames on Corp., § 55, n. 3; Grant on Banking, 1, 6, 381, 614; *Bank for Savings v. The Collector*, 3 Wall. 495. To this general definition the act of Congress adds, "buying and selling exchange, coin and bullion."



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The construction of the act, since banking is not in itself a corporate franchise, but a limitation upon and in derogation of common-law rights, must be strict and exclusive. *Curtis v. Leavitt*, 15 N. Y. 52; *Bullard v. Bank*, 18 Wall. 589 (*ante*, p. 93). This section is a rescript of section 18 of the General Banking Law of New York, passed in 1838, and as to these provisions is *in totidem verbis*. The New York act has passed under careful scrutiny, and has met with frequent judicial interpretation. The question in this issue—the power of a bank to traffic in stocks—arose under the New York act, in *Talmage v. Pell*, 7 N. Y. (3 Seld.) 327, and the court, after conceding that stocks might be legitimately bought or taken for many purposes incident to the express power to conduct the business of banking, at p. 343, says: “The proposition, however, to be established, is the right to traffic in them, or to acquire them for the special objects contemplated by the arrangement of the parties in this case; and these sections neither prove nor tend to prove any authority of that nature.” \* \* \* “I am, for the reason suggested, of the opinion that this bank had no authority to traffic in stocks as an article of merchandise.”

The same point was ruled in *Bank Commissioners v. St. Lawrence Bank*, 7 N. Y. 513; *Curtis v. Leavitt*, 15 id. 168, and in *Barnes v. Ontario Bank*, 19 id. 152.

In the construction of the powers of National banking associations, in other matters, as given in section 8 of the act, similar views are held by the Supreme Court of Pennsylvania, in *Fowler v. Sculley*, 72 Penn. St. 516 (*post*), and in *The First National Bank of Lyons v. The Ocean National Bank*, 60 N. Y. 278 (*post*); *Shinkle v. The First National Bank of Ripley*, 22 Ohio, 516 (*post*); *Shoemaker v. The National Mechanics' Bank*, 2 Abb. (U. S.) 416 (*ante*, p. 169); and *Stewart v. The National Union Bank*, id. 424 (*ante*, p. 175). And the principle announced in these cases is fully recognized by this court in *The First National Bank of Charlotte v. The National Exchange Bank of Baltimore*, 39 Md. 610.

The only case in conflict is *Leach v. Hale*, 31 Iowa, 69 (*ante*, p. 466), and that is so evidently a case of bailment, and nothing more, that not even the positive assertion of the court can avail against the facts. The view taken in this case, too, is fully and satisfactorily controverted in the analogous case of *Wiley v. The First National Bank of Brattleboro*, 47 Vt. 546 (*post*). The cases of *Caldwell v. The National Mohawk Valley Bank*, 64 Barb. 333, a State bank at

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the time of the contract, and *Van Leuven v. The First National Bank of Kingston*, 6 Lans. 373, and 54 N. Y. 671 (*post*), a designated depository under section 45 of the act (Rev. Stat. U. S., § 5153)—are for these reasons not in point, and the former is ignored, and the latter explained by the Court of Appeals of New York in its latest utterance in 60 N. Y. 278.

The construction thus given is alike applicable to the purchase or sale of all kinds of marketable securities other than bills of exchange, where gain or any other purpose than those specially mentioned is the object of its dealing. Inasmuch, then, as the corporation itself could not lawfully engage in such purpose or sale, it could not authorize its agents so to deal, and the contracts or representations of the agent could not fall within the scope of his authority. *U. S. v. The City Bank of Columbus*, 21 How. 556. And as persons dealing with the agents or officers of a corporation are held to know the powers of the corporation (*The Miner's Ditch Company v. Zellerbach et al.*, 1 Withrow's Am. Corp. Cases, 275 [37 Cal.] 543), there can be no implication of authority. *Pierce v. Madison & Ind. Railroad Co.*, 21 How. 443. Nor will a corporation be held liable for the fraud of its agent committed *colore officii*. *Mayor and Common Council v. Eshbach*, 18 Md. 276; *Same v. Reynolds*, 20 id. 1; *Co. Commissioners A. A. Co. v. Duckett*, id. 468; *Horn v. Mayor and Common Council*, 30 id. 218; *Foster v. Essex Bank*, 17 Mass. 599; *Mechanics' Bank v. N. Y. and N. H. Railroad Co.*, 13 N. Y. (3 Kern.) 600.

Is the appellee estopped from making such a defense?

The doctrine of estoppel, as applicable to such a defense by a corporation, is very clearly put in *Hood v. N. Y. & N. H. Railroad Co.*, 22 Conn. 1, 502, thus: "Where a corporation has the power to do an act, they may be estopped from objecting that the form they adopted was not the exact mode prescribed by the charter; but where the question is one of power, they cannot be deemed estopped to deny that they have done what they never could by legal possibility have done." And this principle is held and enforced in *The Penn., Del. & Md. Steam Navigation Co. v. Dandridge*, 8 G. & J. 248, and cases cited at p. 320; in the cases last above cited, and in *Albert and Wife v. The Savings Bank*, 2 Md. 159.

MILLER, J. A question of importance and of first impression in this State arises on this appeal. The suit was instituted by the

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appellant against appellee, a National bank organized under the act of Congress, approved June 3, 1864, known as the "National Currency Act." The first and second counts of the declaration aver in substance, that the defendant, as part of its business as such banking association, was engaged in the sale of the bonds of the Northern Pacific Railroad Company, and in soliciting orders for the purchase of the same and receiving commissions for such sales and orders, and by means of certain specified false, fraudulent and deceitful representations made by its teller, the plaintiff was induced to and did purchase from the bank two of said bonds of \$500 each, and paid the bank therefor the sum of \$1,000, and was thereby damnified. The case was tried upon issue joined on the plea of not guilty. There was conflicting proof as to the making of the alleged false representations by the teller. The court rejected all the prayers offered on both sides and instructed the jury in effect that the National Banking Act, under which the defendant was organized, limits the action of the bank to the pursuit of the object specified in the act of Congress, and that the purchase and sale of such bonds is not within the chartered powers of the defendant, and that the plaintiff cannot recover against the defendant in this action, although the jury may find from the evidence that the teller of the bank fraudulently induced the plaintiff to purchase the bonds in question by making the alleged false representations, and that she suffered loss thereby. This presents broadly and clearly the question whether the bank has authority for selling bonds of railroad companies on commission.

A bank, like other private corporations, is confined to the sphere of action limited by the terms and intention of its charter. The Supreme Court, in the case of the *Bank of the United States v. Dandridge*, 12 Wheat. 68, states the rule by which the powers of the bank are to be determined thus: "Whatever may be the implied powers of aggregate corporations by the common law, and the modes by which those powers are to be carried into operation, corporations created by statute must depend, both for their powers and the mode of exercising them, upon the true construction of the statute itself." And in that case the court adopt, as entirely correct and applicable to the bank, the doctrine laid down by MARSHALL, Ch. J., in 2 Cranch, 167, in reference to an insurance company, viz.: "Without ascribing to this body, which in its corporate capacity is the mere creature of the act to which it owes its

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existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may be correctly said to be precisely what the incorporating act has made it, to derive all its powers from that act, and to be capable of exerting its faculties only in the manner in which that act authorizes." And in this State the law is well settled that a corporation created for a specific purpose not only can make no contract forbidden by its charter, but in general can make no contract which is not necessary, either directly or incidentally, to enable it to answer that purpose. In deciding, therefore, whether a corporation can make a particular contract, it must be considered in the first place, whether its charter or some statute binding upon it forbids or permits it to make such a contract; and if the charter and valid statutory law are silent upon the subject, in the second place, whether the power to make such a contract may not be implied on the part of the corporation as directly or incidentally necessary to enable it to fulfill the purpose of its existence; or whether the contract is entirely foreign to that purpose; a corporation has no other powers than such as are specifically granted, or such as are necessary for the purpose of carrying into effect the powers expressly granted. *Steam Nav. Co. v. Dandridge*, 8 G. & J. 318, 319. We must, therefore, determine the true construction of the act of Congress authorizing the formation of these banking associations, and whether the power to make contracts like the one in question is expressly conferred upon them, or is directly or incidentally necessary to enable them to fulfill the purpose of their creation, or is entirely foreign to that purpose.

So far as the purpose of the law is indicated by its title, it is, "to provide a National currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof." After prescribing in previous sections the mode by, and the conditions under which banking associations may be formed, the 8th section declares that every association so formed shall become a body corporate, from the date of its certificate of organization, but shall transact no business "except such as may be incidental to its organization, until authorized by the Comptroller of the Currency to commence the *business of banking*." Power is then given it to adopt a corporate seal, to have succession by the name designated in its organization certificate, and in that name to make contracts and sue and be sued, to elect directors and other officers, "and

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exercise under this act all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt, by receiving deposits, by buying and selling exchange, coin, and bullion, by loaning money on personal security, and by obtaining, issuing and circulating notes according to the provisions of this act." This is the only portion of the statute to which, for the purposes of this case, it is necessary to refer. By it the associations are not simply incorporated *as banks*, and the scope of their corporate business left wholly to implication, but the kind of banking which they may conduct is limited and defined. As we read the language of this 8th section, it authorizes the associations to carry on banking "by discounting and negotiating promissory notes," etc., and to exercise "all such incidental powers" as shall be necessary to conduct *that business*. The mode in which the incidental powers may be exercised is not defined, but all incidental powers which they can exercise must be necessary or incidental to the business of banking, thus limited and defined. To the usual attributes of banking, consisting of the right to issue notes for circulation, to discount commercial paper and receive deposits, this law adds the special power to buy and sell exchange, coin, and bullion, but we look in vain for any grant of power to engage in the business charged in this declaration. It is not embraced in the power to "*discount and negotiate*" promissory notes, drafts, bills of exchange and other evidences of debt. The ordinary meaning of the terms "to discount," is to take interest in advance, and in banking is a mode of loaning money. It is the advance of money not due till some future period, less the interest which would be due thereon when payable. The power "to negotiate" a bill or note is the power to indorse and deliver it to another so that the right of action thereon shall pass to the indorsee or holder. No construction can be given to these terms as used in this statute, so broad as to comprehend the authority to sell bonds for third parties on commission, or engage in business of that character. The appropriate place for the grant of such a power would be in a clause conferring authority to "buy and sell," but we find that limited to specific things, among which bonds are not mentioned, and upon the maxim *expressio unius est exclusio alterius*, and in view of the rule of interpretation of corporate powers before stated, the carrying on of such a business is pro-

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hibited to these associations. Nor can we perceive it is anywise necessary to the purpose of their existence, or in any sense incidental to the business they are empowered to conduct, that they should become bond-brokers or be allowed to traffic in every species of obligations issued by the innumerable corporations, private and municipal, of the country. The more carefully they confine themselves to the legitimate business of banking as defined in this law, the more effectually will they subserve the purposes of their creation. By a strict adherence to that, they will best accommodate the commercial community, as well as protect their shareholders.

Such is our construction of this statute, and it is supported by the best considered authorities and the decided preponderance of judicial opinion in other States. This 8th section is almost identical in terms (and as respects the present question, completely so) with the Banking Act of New York, of 1838, ch. 260, and the Court of Appeals of that State, in *Talmage v. Pell*, 3 Seld. 328, held that banking associations formed under that law have authority only to carry on the business of banking in the manner and with the powers specified in the act, and have no power to purchase State stocks, to sell at a profit, or as a means of raising money, except when received as security for a loan, or taken in payment of a loan or debt. In speaking of the transaction under review in that case, the court say the banking company "purchased these bonds as they might have purchased a cargo of cotton to send to market to be sold at the risk of the vendor for the highest price that could be obtained. No authority to traffic in either commodity is expressly given by the law of 1838. It is, therefore, claimed as a power incidental to the business of *banking*. But the 18th section of the act declares that this business shall be carried on by discounting bills, notes and other evidences of debt, by loaning money on real and personal security, by buying and selling gold and silver bullion, foreign coin and bills of exchange, etc. The subjects pertaining to the business of banking are designated, and the express powers of the association are limited to them, and to such incidental powers as may be necessary to transact the business thus defined by the Legislature."

They then proceed to show that the claim to base the validity of the contract upon any incidental power was unfounded, and pronounce the transaction illegal, and the assignment by the company of mortgages which they held as collateral security for the purchase,

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void. So also in recent decisions of the courts of last resort in several of the States where this act of Congress, and especially its 8th section, has been considered, we find it construed in entire accord with the view we have taken of it. We refer to *Fowler v. Scully*, 72 Penn. St. 456 (*post*); *Shinkle v. First National Bank of Ripley*, 22 Ohio St. 516 (*post*); *Wiley v. First National Bank of Brattleboro*, 47 Vt. 546; S. C., 19 Am. Rep. 122 (*post*); and *First National Bank of Lyons v. Ocean National Bank*, 60 N. Y. 278; S. C., 19 Am. Rep. 181 (*post*). In the last-mentioned case there is a very able opinion of the court by ALLEN, J., in which he says he fully concurs in the views expressed by Judge WHEELER in the Vermont case, and in reference to the case of *Van Leuven v. First National Bank of Kingston*, shortly reported (the opinions of the judges not being given) in 54 N. Y. 671 (*post*), which has been pressed upon our attention by the appellant's counsel, he says it decided no general principle, but by a divided court it was determined "that the contract in that case, under the circumstances, was the contract of the corporation, and not the individual contract of the president."

We are, therefore, clearly of opinion that this business of selling bonds on commission is not within the scope of the powers of the corporation, and the bank could not, under any circumstances, carry it on, and being thus beyond its corporate powers, the defense of *ultra vires* is open to the appellee. 8 G. & J. 248. And it follows from this that the bank is not responsible for any false representations made by its teller to the appellant, by which she was induced to purchase the bonds in question. Hence there was no error in the court's instruction to the jury nor in rejection of the appellant's first and second prayers.

But by the third and fourth counts of the declaration, and the appellant's third and fourth prayers it is sought to give another character to the transaction, and to place the right to recover upon a different ground. They present the case in this view, viz.: that there was no *sale* and *purchase* of the bonds, but by the false representations of the teller the appellant was induced to *receive* them instead of money, *in payment* of the draft on New York, which she presented at the bank to be cashed or collected. It is argued that in this aspect the transaction amounts to the same thing as if the teller had cashed the draft, by paying her over the counter in depreciated or worthless bank notes, representing them to be good. But the answer to this position is, that there is no

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evidence in the record to support it. The proof shows that on the 6th of October, 1871, the appellant presented at the bank a draft on New York, for \$1,047, and asked Mr. Newcomer, the teller, if it was good, and if he would cash it. The teller gave her \$47 in money, and a *certificate of deposit* for the balance to the effect that she "has deposited in this bank \$1,000, payable to the order of herself on return of this certificate properly indorsed." This instrument is in the usual form of a certificate of deposit, bears date the 6th of October, 1871, and is signed by the teller for the cashier. There is a discrepancy in the testimony as to whether any thing was said at that time about investing her money in Northern Pacific bonds. According to her testimony, as stated in the record, it may be inferred the alleged false representations were then made, but whether before or after she received the certificate of deposit does not clearly appear, and according to the testimony on the other side, nothing was said about these bonds until some ten or twelve days thereafter, when she returned and insisted upon investing her money. But it is immaterial when this occurred, because it is an undisputed fact that she received and accepted the certificate on that day, long before the bonds were delivered to her. The draft to the extent of \$1,000 was received by the bank as money, and as such it passed to her credit, and she became the creditor of the bank for that amount as an ordinary depositor. Whatever may have been said at or before this time, it is clear beyond dispute that by this transaction the draft was, as between the bank and herself, cashed or converted into money which became hers in the coffers of the bank, to use and dispose of as she saw fit. It is further shown by undisputed testimony, that these bonds were ordered by the cashier from the Baltimore brokers, and received on the 19th of October, 1871, a few days after the order for them was sent; that they remained in the bank until some time in April following, when the appellant either in person or through an agent *returned the certificate of deposit*, and got the bonds, paying the interest accrued at the time of the purchase out of the January coupons on the bonds which the teller then cashed for her; that she thereafter retained the bonds, collecting the interest upon them up to July 1st, 1873, and that they were sold in the market at par and accrued interest up to the financial crisis in the fall of 1873. From these facts the law can regard the transaction in no other light than as a *purchase* of these bonds by the

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appellant through the teller or cashier, she paying therefor her own money deposited to her credit in the bank. It was entirely competent for the bank to receive it as a deposit of so much money, and there is no evidence in the case legally sufficient to authorize a jury to infer that the teller (acting as he would be in that respect in the discharge of his duty, and within the scope of his employment) cashed that draft by passing off upon her these bonds instead of money in payment therefor. For these reasons there was no error in the rejection of the two last prayers of the appellant, and the judgment must be affirmed.

Having disposed of the case in this way, it becomes unnecessary to express any opinion upon the question argued at bar, whether an action like this will lie against a corporation in its corporate character, for deceit practiced by its officers or agents.

*Judgment affirmed.*

## THIRD NATIONAL BANK OF BALTIMORE, appellant, v. BOYD.

(44 Maryland, 47.)

*National bank — Power of, to take collateral security — Deposits for safe-keeping — Measure of damages on loss of bonds.*

A National bank received from a customer bonds as collateral security for a debt then existing, and for future obligations. Afterward, and after the customer had paid his indebtedness, the bonds were stolen from the bank. *Held*, (1) that the bank was not a gratuitous bailee of such bonds; (2) that it had power to take the bonds as security for existing or future loans; (3) that it was liable if it failed to exercise ordinary care and diligence in keeping the bonds; and (4) that the measure of damage was the value of the bonds when stolen and not when demand of them was made.\*

**A**CTION by Boyd to recover the value of certain stocks and bonds. The opinion sufficiently states the case. The verdict and judgment were for the plaintiff, and the defendant appealed.

*Henry Stockbridge & Thomas Donaldson*, for appellant.

*John H. Thomas & S. Teackle Wallis*, for appellee.

\* See *Wiley v. First National Bank of Brattleboro*, *post*, and *note*.

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BARTOL, C. J. This suit was brought by the appellee, to recover the value of certain coupon bonds and stocks, that passed like bank notes, by delivery, which had been deposited by the plaintiff with the defendant, and which had been stolen from the defendant, in consequence of its alleged failure to exercise ordinary care in the custody of them.

The case is one that, from its nature, depended at the trial below mainly on the questions of fact arising upon the evidence, with regard to the manner in which the bonds were lost, and the vigilance and care exercised by the bank in their custody. These were questions exclusively for the jury, whose province it was to decide whether there was any want or omission of ordinary care and diligence on the part of the bank, from which the loss of the plaintiff's property resulted. These questions were submitted to the jury by the Circuit Court, were decided by them against the bank, and we have no authority or power to review their verdict.

All the prayers asked by the defendant, being either conceded by the plaintiff's counsel or granted by the Circuit Court except the *tenth*, the only matters presented for our consideration on this appeal arise upon the defendant's *tenth* prayer, which was refused ; and the *first*, *fourth*, *fifth*, *sixth* and *seventh* prayers of the plaintiff, which were granted.

It appears by the evidence that the appellant was a bank organized under "*the National Currency Act of 1864*." The firm of William A. Boyd & Co., of which the appellee was senior member, was a large customer of the bank, through which all the banking business of the firm was transacted, and from which it received accommodations as needed. On the 5th day of February 1866, the firm was indebted to the bank about \$5,000, when the appellee voluntarily proposed to the president of the bank to deposit with the bank a large amount of bonds, about \$37,000, as collateral security for his present and future indebtedness. The terms of the deposit as agreed on between Mr. Boyd and the president were dictated by the latter to the discount clerk — and were as follows :

"THIRD NATIONAL BANK, *February 5, 1866.*

"William A. Boyd has deposited with the Third National Bank of Baltimore \$20,000 in United States 5-20 bonds, and \$1,500 5-20, July, 1865 ; \$5,000 Hudson County, New Jersey ; \$5,000 Town of Saratoga, New York, 7 per cent bonds ; \$5,000 stock of Third National Bank of Baltimore, as collateral security for the payment of all obligations of Wm. A. Boyd and Wm. A. Boyd &

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Co., to the Third National Bank of Baltimore, at present existing, or that may be incurred hereafter, with the understanding that the right to sell the above collaterals in satisfaction of such obligations is hereby vested in the officers of the Third National Bank.

(Signed)

"A. H. BARNITZ,  
*Discount Clerk.*"

This paper was kept by the cashier of the bank in the same envelope with the bonds—afterward *memoranda* were inclosed therein, signed by the appellee's attorney and by the cashier, showing that certain of the bonds originally deposited had been withdrawn, and others deposited to replace them.

It appears from the evidence "that while these collaterals remained in the bank, the firm kept a deposit account with the bank, having an average amount of about \$4,000 on deposit, and from time to time as it needed, obtained discounts ranging from \$2,000 to \$15,000 on the security of the collaterals, but frequently, and for considerable times, as much as five months at a time, it sometimes owed the bank nothing, but left the bonds in its vault; that at times when the firm wanted money for a very short time, it had obtained it from the bank, on the security of these collaterals on what were called 'call loans' by checks such as the following:

"BALTIMORE, *July 13, 1871.*

"Third National Bank of Baltimore pay to order of call loan on general collaterals, *four thousand dollars.*

"WILLIAM A. BOYD & Co."

"The firm was not indebted to the bank subsequent to July, 1872, when it paid its last indebtedness; the bonds were not withdrawn, but left with the defendant under the original agreement." The bank was robbed and the bonds stolen in the manner described in the testimony, between Saturday evening, the 17th, and Monday morning, the 19th of August, 1872. It appears from the proof that the giving of the bonds as collateral security was the voluntary act of the plaintiff, not done at the instance or request of the defendant; that the bank officers considered the account of the plaintiff's firm a very desirable one, and considered the arrangement by which every liability of theirs was secured by the collaterals, very advantageous to the bank; "which was under no obligation to lend them any thing; but the bonds and stocks were to be held as collateral security for all loans that might be made to them,

and for their liability on any paper signed or indorsed by them, which might at any time be held by the bank."

The defendant, by its *tenth* prayer, asked the court to instruct the jury "That the defendant had no power, by the act of Congress under which it was incorporated, to assume and undertake the keeping of the plaintiff's bonds, while they were not held as collateral security for debts owing to it, and if the jury shall find that when the bonds were stolen \* \* \* there was not, and had not been for nearly three weeks, any indebtedness for which they were held as security, that the plaintiff cannot recover in this action."

This prayer raises the question of the power of the bank to accept and retain the deposit of the plaintiff's bonds, in the manner and for the purpose disclosed in the evidence. Having been organized under the act of Congress of 1864, chapter 106, the powers of the bank are limited and defined by the provisions of that act.

By section 8 it is authorized "to exercise all such incidental powers as shall be necessary to carry on the business of banking by discounting promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security, and by obtaining, issuing and circulating notes according to the provisions of this act."

The construction of this section was considered by this court in *Weckler v. First National Bank of Hagerstown*, 42 Md. 581; S. C., 20 Am.Rep. 95 (*ante*, p. 533). The precise question, however, now presented, did not arise in that case. There the attempt was made to hold the bank responsible for alleged fraudulent representations made by its teller in the sale of bonds of the Northern Pacific Railroad Company, which the *narr.* alleged the bank was engaged in selling on commission. It was decided, that "the business of selling bonds on commission was not within the scope of the powers of the corporation," under the act of Congress to which we have referred. It was further held that the defense of *ultra vires* was open to the bank under the decision in "*The Steam Navigation Co. v. Dandridge*, 8 G. & J. 318, 319; and consequently that the bank was not responsible for any false representations made by its teller to the plaintiff, whereby she was induced to purchase the bonds in question." It is contended that the case now under consideration comes within that decision. In the argument of the

cause, the counsel for the appellant has treated the transaction as a mere gratuitous deposit, simply for the convenience or accommodation of the appellee, and for the purpose of affording a place of safe-keeping for his bonds, and has argued that the bank had no power to accept a bailment of that kind, or in other words, to become a mere safe deposit company, and was not, therefore, responsible for the loss. There is very strong ground, both upon reason and authority, in support of the proposition that a National bank, deriving its existence and exercising its powers under the act of Congress referred to, is not authorized to enter into a contract as a mere gratuitous bailee, by receiving on special deposit for safe-keeping merely, coin, jewelry, plate, bonds or other valuables. Such a contract does not appear to be authorized by the terms and the 8th section, as a transaction "within the ordinary course of business of banking, or incident to it;" and has been decided by the Supreme Court of Vermont to be unauthorized by the law, and beyond the scope of the corporate powers. *Wiley v. First National Bank of Brattleborough*, 47 Vt. 546; S. C., 19 Am. Rep. 122 (*post*). The very-well-considered opinion by Judge WHEELER in this case will be found in *The American Law Register* (N. S.), vol. 14, p. 342, accompanied by an able note from the pen of Judge REDFIELD, in which the cases are collected and reviewed.

In the case of *The First National Bank of Lyons v. The Ocean National Bank*, 60 N. Y. 278; S. C., 19 Am. Rep. 181 (*post*), the Court of Appeals of New York have recently made a similar decision.

Assuming these decisions to be correct, and we are not disposed to question their soundness, it is clear that the contract entered into by the bank in this case was not a mere gratuitous bailment. As shown by the paper of February 5th, 1866, the bonds were not received on special deposit, *for safe-keeping merely*, but were received as collateral security for a debt then existing, and for all obligations that might thereafter be incurred by the depositor.

We entertain no doubt of the power of the bank to enter into a contract of that kind. To accept such collateral security for existing debts and for future loans and discounts is a transaction within the usual course of the business of banking, and incident thereto, and, therefore, within the terms of the act of Congress.

The power of National banks to receive such deposits was distinctly recognized by the Supreme Court of Vermont and the Court

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of Appeals of New York, in the cases before cited, and we are not aware that it has ever been questioned. On this point we refer to the able opinion of Judge SHARWOOD, in *Erie Bank v. Smith, Randolph & Co.*, 3 Brewst. 9.

In *Maitland v. The Citizens' National Bank*, 40 Md. 540; S. C., 17 Am. Rep. 620, this court affirmed the right of a National bank to receive on deposit the note of a third person as collateral security for future loans or advances to the depositor.

The original contract of bailment being valid and binding, the obligation of the bank for the safe custody of the deposit did not cease when the appellee's debt had been paid. There is no evidence that the contract was changed; on the contrary, the evidence shows "the bonds remained with the bank under the original agreement," as collateral security for any indebtedness of the appellee that might thereafter accrue, and for any liability of himself, or of the firm of which he was a member, or any paper signed or indorsed by them, which might at any time be held by the bank. For these reasons the Circuit Court committed no error in refusing the appellant's tenth prayer.

The appellant's counsel have argued that the memorandum of February 5th, 1866, cannot be construed as a contract made by the appellant, because it does not appear that the officers by whom it was made were authorized to bind the bank.

This point is not properly before us, was not made in the Circuit Court, and is not presented by the bill of exceptions. All the prayers of the appellant go upon the theory that the bonds were held by the bank as collateral security.

But, even if the question of the authority of the officers to bind the appellant were open on this appeal, it may be observed that the contract of bailment being one which it was competent for the corporation to make, and having been made by its officers, acting within the scope of their general powers and apparent authority, and in the exercise of powers usually delegated to like officers, the bank would be estopped to deny their authority. It may be added further, that there was evidence from which the jury might properly have inferred that the authority had been conferred upon the president and cashier, and that their acts were known to and sanctioned by the directors. *Union Bank v. Ridgely*, 1 H. & G. 325, 413, 430.

But, as we have before said, the question of the authority of the

officers to act for the bank in the transaction is not before us. 29 Md. 2, Rule 4.

With respect to the several prayers of the appellee which were granted by the Circuit Court, and referred to in the bill of exceptions, we do not understand that any objection is made to them by the appellant, so far as they instructed the jury upon the question of the degree of care which the appellant's officers were bound by law to exercise in the custody of the appellee's bonds. In this respect they do not differ from the prayers granted at the instance of the appellant.

By the appellee's *first* prayer, the jury were instructed that the defendant would be responsible if the jury found from the evidence that the bonds had been stolen, "in consequence of the failure on the part of the defendant to exercise such care and diligence in the custody or keeping of them as, at the time, banks of common prudence, in like situation and business, usually bestowed in the custody and keeping of similar property belonging to themselves; that the care and diligence ought to have been such as was properly adapted to the preservation and protection of said property, and to have been proportioned to the consequence likely to arise from any improvidence on the part of the defendant." No objection has been made, nor could any be justly urged against this proposition. The prayer further instructed the jury, that in determining whether or not such care and diligence were used, "the jury may take into consideration whether it was a proper precaution for the defendant to have had an inside watchman at night, and on Sundays, whether such watchman ought to have kept awake at night, and whether the bank ought ever to have been without an inside watchman at any part of the day on Sunday, and that they may take into consideration the nature and value of said bonds, their liability to loss, the temptation they offered to theft, the difficulty of recovering them if stolen, the situation of the building and vault, and the sufficiency of the safe in which the defendant kept them at the time they were stolen."

Exception has been taken to the last part of the prayer, because of the enumeration of certain questions, as proper to be considered by the jury, in determining whether such care and diligence had been used by the bank, as was defined in the prayer. But we find no error in this part of the instruction; the particular subjects of inquiry mentioned were proper for the consideration of the jury;

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their province was not invaded, nor was there any thing to mislead them ; they were not told that in any of the particulars mentioned, the evidence showed a want of due and ordinary care on the part of the bank ; and by the appellee's *seventh* prayer they were instructed, "that it was a question to be determined by them from all the facts and circumstances in the case, whether there was or was not that degree of care and diligence used by the defendant, in the protection and preservation of the plaintiff's property, which is defined in the plaintiff's first prayer."

The degree of care and diligence required by the law was properly defined by the Circuit Court ; the question, whether it had been exercised by the defendant, was fairly submitted to the jury upon all the facts and circumstances of the case. This was a question of fact, exclusively within the province of the jury to decide. We have no power to disturb their verdict, and we have refrained from stating the facts and circumstances showing the manner in which the most extraordinary and unforeseen robbery was committed upon the bank.

The only question left for us to consider is, as to the proper measure of damages. This was decided by the Circuit Court to be, "the value of the bonds at the time they were stolen." The appellant contends that this was error, and insists that the true measure is their value on the 9th day of September, 1872, when they were demanded by the appellee. It appears by the agreement of counsel that the bonds had slightly diminished in value between the time of the robbery and the time they were demanded. At the former date they were worth \$25,911.25, and at the latter their value was \$25,400.63.

In our opinion the rule laid down by the Circuit Court is correct. In a case of this kind the measure of damages is the value of the property lost ; the only question is, at what time is this value to be computed ? Its value not being fixed and permanent, but liable to fluctuate, the time fixed for ascertaining it may become of much importance, and has been the subject of considerable discussion in the courts, and the decisions are by no means uniform. In Maryland the measure of damages in *trover* is ordinarily the value of the property at the time of the conversion (*Hepburn v. Sewell*, 5 H. & J. 211 ; *Stirling v. Garritee*, 18 Md. 468) and we think the same rule may, by analogy, be applied to the present case. Here the ground of the action is the alleged breach of the contract of bail-



ment, by reason of the failure on the part of the bank to exercise due care in the custody of the bonds, whereby they were lost ; the true measure of damages would seem to be their market value, computed at that time. This question arose in *Maryland Marine Ins. Co. v. Dalrymple*, 25 Md. 244. In that case there was a pledge or hypothecation of stock as collateral ; the contract of bailment having been broken by the illegal sale of the stock by the bailee, the other party, being cognizant of the breach, waited for two years, and the stock having risen in the market, demanded the same, offering to redeem, and claimed that the value of the stock should be computed at the time of his demand. But it was held that the measure of damage was its value at the time of the breach.

Without repeating the reasons and authorities upon which that decision was placed, we refer to the opinion of the court at pages 305, 306, 307, 308.

In *Maury and Osburn v. Coyle*, 34 Md. 235, cited by the appellant, it was ruled that the plaintiff was entitled to recover the value of the bonds deposited, ascertained at the date they were demanded. But that case is not applicable here ; there was no evidence of the time when they had been lost, or that they had changed in value ; and the contract there sued on was not the same as this. In that case, by the contract of bailment, the bailee had the option to return the securities deposited, or their value in money on demand. In this case, the legal obligation of the bailee was to keep the bonds of the appellee safely, and to return *them* to him when the contract ended. Strictly, this obligation could not be discharged by the payment to the appellee of their value in money ; after the bonds had been lost, and it had become impossible to return them, there was no necessity for a demand, and when made, it could have no significance or effect in determining the rights of the parties, these had become fixed when the breach occurred, by the loss of the bonds, and in our judgment, the proper measures of damages is their value computed at that time. Finding no error in the rulings of the Circuit Court, the judgment must be affirmed.

*Judgment affirmed.*

## MAGRUDER V. COLSTON.

(44 Maryland, 349.)

*National bank — Liability of pledgee of stock.*

Stock in a National bank was pledged to secure a debt, with power to the pledgee to sell it on default of payment. *Held*, that a sale by him pursuant to the power was not voidable as a fraud on creditors of the bank, though he sold because he believed the bank insolvent, and in order to escape personal liability as a stockholder.

Persons who hold stock of a National bank in pledge, the certificates of which stand on the books of the bank in the name of the pledgee, are, in contemplation of the National Banking Act, stockholders, and so long as they thus hold the stock in pledge are responsible to the creditors of the bank in proportion to the amount so held.\*

**A**CTION by Magruder, as receiver of the Merchants' National Bank, of Washington, against Colston and others, to recover, from the defendants, as stockholders of the said bank, the par value of stock in said bank. The opinion states the case.

The jury rendered a verdict for the defendants, and from the judgment entered thereon plaintiff appealed.

*William M. Merrick*, for appellant. The holder of stock, knowing a bank to be insolvent, for the purpose of escaping his responsibility to the creditors of the bank, cannot lawfully transfer his stock for nominal consideration to a man of straw, and thereby rid himself effectually of his obligation to contribute an amount equal to the value of his stock to satisfy the debts of the bank under the 12th section of the Banking Law.

Fraud vitiates every thing, as well an assignment of stock as any other act intended to prejudice the rights of innocent parties. *Marcy v. Clark*, 17 Mass. 334; *Holyoke Bank v. Burnham et al.*, 11 Cush. 183 to 186; *Roman v. Fry*, 5 J. J. Marsh. 634; *Moss v. Oakley*, 2 Hill, 270; *Adderly v. Storm*, 6 id. 624 to 628; *Hale v. Walker*, 31 Iowa, 344, 354; *Matter of the Empire City Bank*, 18 N. Y. 223; *Rosevelt v. Brown*, 1 Kern. 148; *Onslow v. Corrie*, 2 Madd. 340; *Ex parte De Pass*, 5 Jurist (N. S.), 1193, 1194; Angell & Ames on Corporations, § 623; *Crease et al. v. Babcock et al.*, 10 Metc. 547.

\* See *Wheelock v. Kost*, ante, p. 406; *Hale v. Walker*, ante, p. 471.

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*Charles Marshall*, for appellees.

GRASON, J. The question presented by some of the prayers, as to the organization of the Mechanics' National Bank of Washington, having been abandoned by the counsel of the appellant, the questions before the court upon this appeal arise upon his third and fourth prayers, which were rejected by the court below, and the appellees' second prayer, which was granted. The record shows that, some time before the failure of the bank, the appellees, who were bankers and brokers in Baltimore city, lent to Bayne & Company eight thousand dollars, payable on call, and took from them as collateral security for repayment of the loan, one hundred shares of the stock of the Merchants' National Bank of Washington, fifty shares of which were in a certificate standing in the name of Oscar A. King, and indorsed in blank by him, and the remaining fifty shares in a certificate standing in the name of Bayne & Company, and indorsed in blank by them. The appellees held these two certificates until the 26th day of April, 1866, when having previously called upon Bayne & Co. for repayment of the loan, and they having made default and instructed the appellees to sell, the latter requested the bank to transfer the stock to them and to issue certificates to them in their own name for it. The bank transferred the fifty shares standing in King's name and issued the certificates therefor to the appellees, but refused to transfer the fifty shares standing in the name of Bayne & Company, because Bayne & Company were indebted to the bank. The appellees sold the whole of the stock to Colston on the 2d day of May, 1866, for one dollar, and delivered to him the certificate for the fifty shares originally standing in the name of King, as well as the certificate standing in the name of Bayne & Co., and the bank thereupon issued a new certificate to Colston in his own name for the fifty shares originally standing in King's name, and delivered it to him on the 2d day of May, the day before the bank failed, and while it was still open and doing business. The appellees proved that at the time of the sale they did not consider the stock worth any thing, and that they intended, when they made the sale to Colston, to avoid complication and difficulties, fearing that the bank, which they had heard was in difficulties, might prove insolvent. They further proved that Colston was not pecuniarily responsible for the amount of the par value of the stock so sold and transferred to

him. The bank closed its doors on the 3d day of May, at 3 o'clock, P. M., and turned out to be insolvent, and this suit was brought by the receiver to recover from the appellees, as stockholders of the bank, the par value of the fifty shares of stock, the certificate of which had been issued to them, and by them transferred to Colston. Upon these facts the appellant's third and fourth prayers asked instructions that if the jury should find that the transfer of the fifty shares of stock was made by the appellees to Colston, with a view and for the purpose of evading or escaping their responsibility under the 12th section of the National Banking Act, such transfer constituted no defense to this action, and did not relieve the appellees from the responsibility which would have attached to them in case the transfer had not been made, and that, if they had so sold the stock under their agreement with Bayne & Co., as a pledge to secure a loan of money, they were still responsible in law to the same extent as if they had been the absolute owners and had sold the legal title to the stock. The appellees' second prayer contained the converse of these propositions.

The 12th section of the National Banking Act provides for the personal liability of stockholders of National banks for the debts of the corporation, in proportion to the amount of stock held by them, and enacts that every person, becoming a shareholder by transfer, shall succeed to all the rights and liabilities of the prior holder of such shares. After a careful examination of the authorities cited in the argument, we are of opinion that persons who hold stock in pledge, the certificates of which stand on the books of the bank in the name of the pledgee, are, in contemplation of the Banking Act, stockholders, and, so long as they thus hold the stock in pledge, are responsible to the creditors of the bank in proportion to the amount so held. The reason for this is obvious. The stock stands on the books of the bank in his name and he is thus held out to the public as shareholder, and persons dealing with the bank have no means of knowing the nature of the contract under which he holds the stock, and have a right to presume, and are led to believe that he is the absolute owner of it, and it is but fair to presume that they deal with the bank upon the faith and credit of parties thus appearing as stockholders. Stockholders are those who appear on the books of the bank as owners of shares, and who are entitled to manage its affairs, and they can only throw off the liabilities incident to that relation by transferring the stock. Until

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this is done they continue to be stockholders within the meaning of the Banking Act. If we depart from the terms of the law and inquire into the equities which may exist between the stockholders and third persons, it cannot fail to embarrass creditors in seeking a remedy for the wrongs which may have been done by the corporation. If creditors must look beyond the legal title, as exhibited by the books of the bank, they can never know against whom to proceed. *Rosevelt v. Brown*, 1 Kern. 153; *Adderly v. Storm*, 6 Hill, 624; *Worrell v. Judson*, 5 Barb. 210; *Crease et al. v. Babcock et al.*, 10 Metc. 545; *United States Trust Co., of New York, Receiver, v. The United States Fire Ins. Co.*, 18 N. Y. 224; *Holyoke Bank v. Burnham et al.*, 11 Cush. 187. These cases arose under State laws making stockholders in corporations personally liable for the debt of the corporation, but the principles announced in them are applicable to cases arising under the act of Congress of 1864, chapter 106. That act makes stockholders only personally liable, and the appellees had parted with their stock when the bank failed, and had, therefore, ceased to be stockholders.

But it was contended by the counsel of the appellant that inasmuch as the assignment and transfer of the stock was made to Colston, under the circumstances detailed in the proof and for a nominal consideration, and with the view and purpose of avoiding any complications and difficulties in which a failure of the bank might involve them, the transfer was a fraud upon the creditors of the bank, and the appellees ought, therefore, to be held to the same liability to which they would have been subjected had they never made the transfer. It must be recollected, however, that they had no right, under their contract with Bayne & Co., to hold the stock as their own property, but had to sell it after the default of the latter in repaying the loan. The only case that bears directly upon this question to which we have been referred, or which we have been able to find, is that of *Holyoke Bank v. Burnham*, reported in 11 Cush. 187. In that case Joseph Burnham transferred certain shares of stock of a manufacturing company to Charles Burnham, who gave his note to Joseph for eight hundred dollars, and the agreement between the parties provided that any time within two years either party should have the right to rescind the sale by a re-transfer of the shares and a surrender of the note. Within the two years the sale was rescinded by Joseph surrendering the note, and Charles re-transferring the shares. Suit was brought against Charles as

shareholder of the corporation, by one of its creditors under the personal liability act of the Legislature of Massachusetts, and it was held that as the shares of stock had been re-transferred under a stipulation which formed part of the original contract between the parties, Charles Burnham was not liable, notwithstanding the transfer had been made for the purpose of avoiding liability under the act. The case was heard by five of the six judges of the Supreme Court of Massachusetts, and Judge DEWEY, in delivering the opinion of the court, says : "As to the second question, the right of the defendant to re-transfer to Joseph Burnham the eleven shares and thus divest himself of subsequent liability arising from his holding stock, the contract between the parties made at the time of the transfer, authorizing such re-transfer at the election of the parties at any time within two years, becomes material, and we are of opinion that under the agreement made at the time of the transfer, and the re-transfer being only an act in execution of it, it is not obnoxious to the charge of having been done in fraud of creditors, although its leading object and purpose might have been, on the part of the defendant, to avoid liability as a member of said corporation. \* \* \* It is unnecessary to consider, therefore, the general question how far persons owning shares in a manufacturing company may, by transferring them to some third person with a view to avoid liability as such owner to the creditor, effectually do so in the absence of such original contract for a re-transfer."

In this case it was part of the original contract between Bayne & Co. and the appellees, that the latter should sell the stock upon the failure of the former to repay the loan upon call, and the sale to Colston was only in execution of it. These facts are very similar to those in the case of the *Holyoke Bank v. Burnham*, and the justice and reason of the principle applied in that case commend themselves to our approval, and we think it ought to be applied to this, and so applying it we find no error in the rulings of the court below.

*Judgment affirmed.*

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Ordway v. The Central National Bank of Baltimore.

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ORDWAY V. THE CENTRAL NATIONAL BANK OF BALTIMORE.\*

*Action against National bank after it has gone into liquidation — Penalties for taking usurious interest — Action for, in State courts.*

An action may be prosecuted against a National bank, although it has resolved to go into liquidation and has provided for the redemption of its circulating notes.†

An action lies against a National bank in a State court to recover the penalties imposed by Congress for exacting unlawful interest.‡

**A**CTION of debt against the Central National Bank of Baltimore, to recover double the amount of interest taken by the bank of the plaintiff in alleged violation of the 30th section of the National Banking Act.

*Marshall & Fisher*, for appellants.

*Machen & Gittings* and *Geo. H. Williams*, for appellee.

ALVEY, J. If it be true, as suggested by the appellee, that the corporation was actually dissolved at the expiration of six months from the 15th of July, 1874, then, of course, this action must abate; for it is perfectly well settled that a suit can no more be prosecuted and judgment recovered against a dead corporation than against a dead man. *Mumma v. The Potomac Co.*, 8 Pet. 281; *National Bank v. Colby*, 21 Wall. 615.

But has the corporation been dissolved? We think not. It has suspended active operations as a banking association — has resolved to go into a state of liquidation — has deposited the money with the Treasurer of the United States, with which to redeem its outstanding circulation, and has received, by re-assignment, its bond deposited to secure the payment of its notes, and it thenceforth stands discharged from all liability on account of such circulating notes, but the statute has not declared that these acts, of their own

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\*To appear in 46 Maryland Reports.

† See *Bank of Bethel v. Pahquioque Bank*, ante, p. 77; *Green v. Walkill National Bank*, post.

‡ See *State v. Tuller*, ante, p. 375; *Missouri River Telegraph Co. v. National Bank*, ante, p. 401; *Newell v. National Bank*, ante, p. 501.

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mere operation, shall effect an absolute and total dissolution of the corporation. And it would be strange if such were the case. There are many other obligations to be provided for beside the circulating notes, and there may be many rights to be protected which would require the continued existence of the corporation. It is not reasonable to suppose Congress intended that, upon simply resolving to go into liquidation, and providing for the redemption of its circulating notes, the banking association should be dissolved. If by such acts it were dissolved, all actions by or against it would abate and parties might be left utterly without remedy for the enforcement of the plainest right or recompense for the most grievous wrong

As we read the sections 5221, 5222, 5223 and 5224, of the Rev. Stats., no such result was ever contemplated. On the contrary, those sections would seem plainly to contemplate the continued existence of the corporation after the re-assignment of the bonds, and the certificate of discharge from the liability for the circulating notes of the banking association; and such would seem to be the construction of the Supreme Court of the United States in the case of *Kennedy v. Gibson*, 8 Wall. 498, 506, and *Bank of Bethel v. Pahquioque Bank*, 14 id. 383, 398. There has been no actual and formal surrender of franchises, and no judicial declaration of dissolution; and acts of a more decisive character than those relied on in this case have been held to be insufficient to operate a final dissolution. *State v. Bank of Maryland*, 6 Gill & Johns. 205; *Brinkerhoff v. Brown*, 7 Johns. Ch. 217; *Boston Glass Manuf. Co. v. Langdon*, 24 Pick. 49; Ang. & Am. on Corp., § 773. It would seem, therefore, that the learned judge below was entirely correct in holding that there had been no abatement of the action by dissolution of the corporation.

The next question to be considered is that raised by the demurrer to the appellant's amended declaration; and that is, whether the action can be sustained in the courts of this State, the action being founded on a statute of the United States?

The action is one of debt, brought by the appellant against the appellee, under the 30th section of the National Banking Act, approved June 3, 1864, to recover double the amount of interest unlawfully taken by the appellee. In the section referred to, it is provided that the knowingly taking, receiving, reserving or charging a rate of interest greater than the rate fixed by the previous



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part of the section, "shall be held and adjudged a forfeiture of the *entire* interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or persons paying the same, or the legal representatives, may recover back, in any action of debt, twice the amount of the interest thus paid, from the association taking or receiving the same, provided that the action is commenced within two years from the time the usurious transaction occurred." The recited provision constitutes section 5198 of the Rev. Stats. U. S., page 1012, which went into operation June 22, 1874. The causes of action set forth in the declaration arose in the year 1873, and the suit was brought as of July 25, 1874.

The 57th section of the Banking Act, under which the appellee was organized, and which was in force at the time of the transaction out of which the causes of action arose, provided "that suits, actions and proceedings, against any association under this act, may be had in any circuit, district, or territorial court of the United States, held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction *in similar cases*." This provision of the act of 1864 was omitted in the Rev. Stats.; but in that revision, by section 5597, it is provided that "the repeal of the several acts embraced in said revision shall not affect any act done, or any right accruing or accrued, or any suit or proceeding had or commenced in any civil cause before said repeal, but all rights and liabilities under said acts shall continue, and may be enforced *in the same manner as if said repeal had not been made*." And in the next succeeding section (5598) it is further provided that "all offenses committed, and all penalties or forfeitures incurred under any statute embraced in said revision prior to said repeal, may be prosecuted and punished in the same manner and with the same effect as if said repeal had not been made." This latter section, manifestly, has reference to public prosecutions alone. In this case the cause of action is a forfeiture, a penalty of a civil nature, for the exacting and taking of usurious interest upon moneys loaned, and the remedy given by the statute is by private civil action of debt to the party grieved. The government or the public is not concerned with it. It is, therefore, a private right, pursued by a private civil action. And it has been decided that the section of the statute upon which the action is

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founded is remedial as well as penal, and it is to be liberally construed to effect the object which Congress had in view in enacting it. *Farmers' National Bank v. Dearing*, 91 U. S. 29, 35 (*ante*, p. 117).

This is not unlike in principle the case of debt brought by a landlord against his tenant for double value for not quitting in pursuance of notice given under statute 4 Geo. 2, ch. 28. In such case, because the penalty or forfeiture prescribed by the act is made to accrue to the party grieved and to be recovered by private action of debt, the courts have taken a distinction between such penalty and a penalty prescribed as criminal punishment, and hold the statute to be remedial. *Wilkinson v. Colley*, 5 Barr, 2694; *Lake v. Smith*, 4 Bos. & Pul. 174. In the last case referred to, being an action of debt on the statute, HEATH, J., said: "The double value has been called a penalty, and it is so in some degree, but the law is also a remedial law." And ROOKE, J., observed: "The act indeed does give a penalty, but it is to the party grieved, and this is a distinction which has often been taken between remedial and penal laws." The action of debt is an ordinary common law remedy, and it lies in the courts of this State, having general common law jurisdiction, as the court in which this action was instituted, on statutes at the suit of the party grieved, either where it is expressly given to such party, as by the statute under consideration, or where a statute prohibits the doing an act under a penalty or forfeiture to be paid to the party grieved, and there is no specific mode of recovery prescribed. This is the well-established doctrine in England (1 Chitty's Pl. 112, and authorities there cited), and it is the law here. There is, therefore, no question but that the court below has jurisdiction in similar cases to that provided for by the statute under which this action was brought.

But it is contended that, notwithstanding the comprehensive and explicit terms employed in section 57 of the act of 1864, ch. 106, giving the right to sue in State courts, inasmuch as the cause of action is a penalty or forfeiture, the remedy can only be brought in the Federal tribunals. It is contended, 1st, that the language of the 57th section should be construed with reference and in subjection to the pre-existing law, and that by the pre-existing law the jurisdiction of the State tribunals in such case as the present was excluded by express provision of the statute; 2d, if such construction be not adopted, then that the savings in the Revised Statutes do

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not embrace the right to sue in a State court in a case like the present; and 3d, that though the statute may confer the right, Congress has no constitutional power to give the State courts cognizance of penal actions, and those courts should refuse to take such cognizance.

The argument in reference to the first proposition, that is on the construction of the 57th section of the National Banking Act, is founded upon the 9th section of the Judiciary Act of 1789 (1 Stat. 76), wherein the jurisdiction of the District Courts of the United States is defined. In that section of the Judiciary Act it was declared that the District Courts should have, *exclusively of the courts of the several States*, cognizance of all crimes and offenses that were cognizable under the laws of the United States, committed within their respective districts, etc., and, among other subjects of jurisdiction, it was declared that such District Courts should "have *exclusive original cognizance* of all seizures on land or other waters than as aforesaid made, and of all suits for penalties and forfeitures, incurred under the laws of the United States. This latter provision in regard to penalties and forfeitures has been inserted in the Revised Statutes in section 711, in defining the jurisdiction of the United States courts that is exclusive of the courts of the several States.

Now, looking at the broad, unqualified language employed in section 57 of the act of 1864, there would seem to be no doubt but that it was the design of Congress that the State courts should take cognizance of actions like the present, as well as all other civil actions against banking associations, and that, if it had been the design to exclude the State courts in such cases, appropriate terms would have been employed to express the intention, as in other acts of Congress when conferring jurisdiction. And though the particular provision has been omitted from the Revised Statutes, yet the saving, by section 5597, is ample to continue the jurisdiction in the State courts as to all transactions occurring before the Revised Statutes were adopted. It is expressly provided that all rights and liabilities under said act shall continue, and may be enforced *in the same manner as if said repeal had not been made*. But if it were conceded that such construction is erroneous, then the question would arise, what is the proper construction of that provision in the Revised Statutes in reference to the exclusive jurisdiction of the Federal courts of all suits for penalties and forfeitures which

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was taken from the Judiciary Act of 1789? And, in answer to this question, it would seem to require no strained construction to warrant the conclusion that that provision of the statute has no application to this case whatever; that it has reference to and contemplates only those penalties and forfeitures of a public nature which may be sued for by the government, or some person in its behalf. And this construction is strongly enforced by several provisions to be found in the Revised Statutes, such as that which requires the district attorneys to furnish statements of all suits instituted by them for the recovery of any fines, penalties or forfeitures. § 772. There is great reason for confining suits of that character to the Federal jurisdiction, but none, it would seem, for excluding the State jurisdiction in a case like the present, where the right is private and is being pursued by a private civil action by the party grieved.

Having shown that there is nothing in the statute of the United States to exclude the State jurisdiction in a case like the present, the question is: 1st, whether in the absence of express terms conferring jurisdiction on the State courts, those courts have jurisdiction to enforce a right under a statute of the United States in a case of the character now under consideration? and if not, 2d, whether Congress can rightfully, by express terms, confer such jurisdiction?

The position and argument of the appellee, if sustained, would result in both these questions being resolved in the negative. If, however, either be resolved in the affirmative, the judgment appealed from must be reversed. The question of the concurrent jurisdiction of the State courts with those of the United States has been the subject of a good deal of discussion both by statesmen and the courts of the country. It was one of the objections urged against the adoption of the Federal Constitution, that it would detract from and materially impair the existing jurisdiction of the State courts. This objection was answered by Mr. Hamilton in the 82d number of the *Federalist*, in which he maintained that the Congress of the Union, in the course of legislation upon the objects intrusted to their direction, might or might not commit the decision of causes arising upon the regulation of any particular subject, to the Federal courts solely, but that, in every case in which the State courts are not expressly excluded by the statutes, they would of course take cognizance of the causes to which

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those acts might give origin. This he inferred from the nature of the judiciary power, and from the general genius of the system. And Chancellor KENT, taking the same view of the subject, and after a full review of the course of decisions, State and Federal, down to the time he wrote, concludes that, in judicial matters, the concurrent jurisdiction of the State tribunals depends altogether upon the pleasure of Congress, and may be revoked and extinguished whenever they think proper, in every case in which the subject-matter can constitutionally be made cognizable in the Federal courts; and that, without an express provision to the contrary, the State courts will retain a concurrent jurisdiction in all cases where they had jurisdiction originally over the subject-matter. 1 Kent's Com. 396-400. The reasoning of the two distinguished writers just mentioned has remained without refutation; and without restatement of their arguments or an attempt to review the decisions upon the subject, it is sufficient to refer to the recent case in the Supreme Court of the United States, which would seem to conclude the very question now under consideration.

The case to which we refer is that of *Clafin v. Houseman, assignee*, 93 U. S. 130; 3 Cent. L. J. 803. In that case the action was brought in a State court by an assignee in bankruptcy to recover against the defendant an amount of money which the latter had collected on a judgment recovered against the bankrupt within four months before the commencement of the proceedings in bankruptcy. The defense taken was, that inasmuch as the assignee was a creature of an act of Congress, and derived all his rights and powers from the Bankrupt Act, and the right to recover was exclusively referable to that statute, the action could not be sustained in a State court, but should have been brought in a court of the United States. This was the only question considered by the court, and the opinion was unanimous that the State court had complete cognizance of the action. It was there held that, inasmuch as the Bankrupt Act gave no exclusive jurisdiction to the courts of the United States, the assignee might well maintain a suit in the State court to recover the assets of the bankrupt; and further, that the statutes of the United States, made in pursuance of the Constitution, are as much the law of the land in the States as the statutes of the States can be, and although exclusive jurisdiction for their enforcement may be given to the Federal courts, yet where it is not given, either expressly or by necessary implica-

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tion, the State courts, having competent jurisdiction in other respects, may be resorted to for the enforcement of rights under such statutes.

The whole subject is well reasoned in the opinion, and the decisions reviewed, and the court very justly observe that when the structure and true relations of the Federal and State governments are considered, there is really no foundation for excluding the State courts from the exercise of such jurisdiction. In discussing the relation of the two governments and the operation of the laws of the Union, the court say: "The laws of the United States are laws in the several States, and just as much binding on the citizen and courts thereof as the State laws are. The United States is not a foreign sovereignty as regards the several States, but it is a concurrent, and, within its jurisdiction, paramount sovereignty. Every citizen of a State is a subject of two distinct sovereignties, having concurrent jurisdiction in the State,—concurrent as to place and persons, though distinct as to subject-matter. Legal or equitable rights acquired under either system of laws may be enforced in any court of either sovereignty competent to hear and determine such kind of rights and not restrained by its Constitution in the exercise of such jurisdiction. Thus, a legal or equitable right acquired under State laws may be prosecuted in the State courts, and also, if the parties reside in different States, in the Federal courts. So rights, whether legal or equitable, acquired under the laws of the United States courts, may be prosecuted in the United States courts, or in the State courts competent to decide rights of like character and class, subject, however, to this qualification, that where a right arises under a law of the United States, Congress may, if it see fit, give to the Federal courts exclusive jurisdiction."

And again, in pursuing the argument, it is said: "This jurisdiction is sometimes exclusive by express enactment, and sometimes by implication. If an act of Congress gives a penalty to a party aggrieved, without specifying a remedy for its enforcement, there is no reason why it should not be enforced, if not provided otherwise by some act of Congress, by a proper action in a State court. The fact that a State court derives its existence and functions from the State laws is no reason why it should not afford relief, because it is subject also to the laws of the United States, and is just as much bound to recognize these as operative within the State

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as it is to recognize the State laws. The two together form one system of jurisprudence, which constitutes the law of the land for the State ; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent. That case leaves nothing to be said as to either aspect of the question here involved ; and, therefore, whether the right to maintain this action be placed upon the express terms of the statute giving cognizance to the State courts, or simply upon the non-exclusion of State jurisdiction, in either case the action is maintainable. And that the cause of action is a penalty, to be recovered in a civil action of debt by the party grieved, constitutes no objection to the State courts taking cognizance of it and enforcing the right."

The case of the *First National Bank of Plymouth v. Price*, 33 Md. 487, has no similitude to the present. In that case the penalty was given by a statute of Pennsylvania, and the decision proceeded upon the principle that, as the law had no extra-territorial operation, the courts of one State will not enforce penalties imposed by the laws of another. But, as has been clearly shown, no such reason or principle applies as to the laws of the United States, when sought to be enforced in the courts of the several States. The Constitution and laws of the Union are the supreme law of the land, and are as much a part of the law of each State, and as binding upon the courts and people as its own local constitution and laws.

From what has been said it follows that the demurrer, so far as it is grounded upon the want of right or power in the court to take cognizance of the case, must be overruled.

There are certain other objections raised under the demurrer to the amended declaration, of a purely technical character ; but these objections appear to be without any substantial foundation, and therefore may be dismissed without comment. For the reasons assigned, the judgment of the court below must be reversed, and the demurrer overruled, and the cause remanded to be proceeded with in regular course.

*Judgment reversed and cause remanded.*

## COMMONWEALTH v. TENNEY.

(97 Massachusetts, 50.)

*Fraudulent conversion by National bank officers of property deposited with bank — Jurisdiction of State courts of offenses by officers of National banks — Fraudulent conversion — Intent.*

A State statute made it larceny for any "officer of an incorporated bank" to fraudulently convert to his own use property of the bank or belonging to any person and deposited therein. *Held*, (1) to apply to officers of National banks located in the State; and (2) that a State court had jurisdiction of an indictment under the statute against an officer or servant of a National bank for the fraudulent conversion of the property of individuals deposited in such bank.\*

An officer of a National bank took bonds deposited with the bank and sent them to a broker in another State as collateral security for money advanced. *Held*, a fraudulent conversion and larceny within the statute.

**I**NDICTMENT under Gen. Stats., ch. 161, § 39, which is as follows: "If an officer of an incorporated bank, or any person in the employment of such bank, fraudulently converts to his own use, or fraudulently takes and secretes, with intent so to do, any bullion, money, note, bill, or other security for money, belonging to and in possession of such bank, or belonging to any person and deposited therein, he shall, whether intrusted with the custody thereof or not, be deemed guilty of larceny in said bank and be punished," etc.

The indictment set forth that the defendant at Greenfield on March 1, 1866, "then and there being a clerk of the First National Bank of Greenfield, a corporation then and there duly and legally established, located, organized and existing under and by virtue of the laws of the United States," did fraudulently convert to his own use certain United States bonds belonging to one Purple, and then and there being deposited in the said bank.

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\*In *Commonwealth v. Hall*, 97 Mass. 570, it was held on the strength of this case that National bank bills are within a State statute punishing the having in possession counterfeits of bank bills "issued by an incorporated banking company established in this State or within the United States." The opinion on this point was simply a statement of the point. As to embezzlements, etc., by officers of National banks, see *Van Campen Case*, ante, p. 185; *United States v. Taintor*, ante, p. 256; *Steele v. Tuller*, ante, p. 375; *Commonwealth v. Felton*, post; *Commonwealth v. Barry*, post, note.



The evidence showed that the defendant while a clerk in the bank, as alleged, took the bonds from their place of deposit and sent them to a broker in New York as collateral security for advances made in stock speculations, but with the understanding that the bonds were not to be sold.

The defendant was convicted, and alleged exceptions.

*C. Allen*, Attorney-General, for the Commonwealth.

*D. Aiken* and *S. O. Lamb*, for defendant.

FOSTER, J. This indictment is founded on Gen. Stats., ch. 161, § 39, within the provisions of which, we have no doubt, National banks, created under the laws of the United States, must be held to be included. The words "incorporated bank" are broad enough to embrace not only banks existing at the date of the passage of the act, but such as have been chartered since; and they are not limited to corporations created by the laws of Massachusetts, but likewise include such National banking corporations as are located within this Commonwealth, if the offense to be punished is here committed.

The further objection is made, that the courts of the United States are vested by the Judiciary Act of September 24, 1789 (U. S. Stat. 1789, chap. 20, § 11), with exclusive cognizance of all crimes cognizable under the authority of the United States, except where it is otherwise provided by the acts of Congress. But an examination of the statutes of the United States leads us to the conclusion that the offense charged in this indictment has not been made punishable by any act of Congress. The enactments cited on behalf of the defendant punish the embezzlement of the property of National banks, but not of the property of individuals, deposited with and in the custody of such banks. U. S. Stats. 1863, chap. 58, § 52; U. S. Stats. 1864, chap. 106, § 55. As the Federal courts have no criminal jurisdiction except that conferred by Congress, no question can be made as to the constitutionality of State legislation punishing such frauds, until they have been made punishable by the Federal laws. There is no view of the relative, or of the concurrent powers of the two governments, which affects the decision of the present case; for all courts and jurists agree that State sovereignty remains unabridged for the punishment of all crimes committed within the limits of a State, except so far as

they have been brought within the sphere of Federal jurisdiction by the penal laws of the United States. *Commonwealth v. Fuller*, 8 Metc. 313; *Commonwealth v. Peters*, 12 id. 387.

The objection that the First National Bank of Greenfield had not been duly organized as a corporation was not insisted upon at the argument, and, so far as we can judge from the evidence reported, appears to have no foundation.

[The court then decided that a former acquittal on the trial of a common law indictment for a larceny of the bonds was not a good plea in bar and continued.]

• With reference to the fraudulent and felonious character of the acts proved, and their sufficiency to warrant a conviction, we entertain no doubt. To take from their place of deposit the bonds of a depositor and send them out of the State to be used as collateral security for the defendant's own debt, was a fraudulent conversion. Intention to restore the bonds, and the agreement of the party who received them not to sell or dispose of them, cannot do away with the criminal nature of the transaction. A guilty intent is necessarily inferred from the voluntary commission of such an act, the inevitable effect of which is to deprive the true owner of his property and appropriate it to the defendant's own use. Perhaps in a majority of cases the party who violates his trust in such a manner does not expect or intend that ultimate loss shall fall upon the person whose property he takes and misuses. But no hope or expectation of replacing the funds abstracted can be admitted as an excuse before the law. The forger who means to take up the forged instrument, the thief who contemplates making eventual restitution, and the man who embezzles money or bonds with the design of restoring them, all fall under like condemnation in courts of justice and wherever the rules of sound morality are respected.

*Exceptions overruled.*

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Flint v. Board of Aldermen of Boston.

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## FLINT V. BOARD OF ALDERMEN OF BOSTON.

(99 Massachusetts, 141.)

*Taxation of shares in a National bank situated in another State.*

Congress has the constitutional right to establish National banks in any State and to provide that the shares of their capital stock shall be exempt from taxation by other States.

Under section 41 of the National Banking Act of 1864, it is unlawful for a State to impose a tax on shares owned by an inhabitant thereof in the capital stock of a National Bank located in another State. \*

PETITION for a writ of *certiorari* to the Aldermen of Boston to reverse their action in refusing to abate a tax assessed to the petitioner, a resident of Boston, on shares of stock in a National bank located in New York.

*C. B. Goodrich* and *L. J. Austin*, for petitioner.

*C. H. Hill* and *J. P. Healy*, for respondents.

Hoar, J. The petitioner is a resident of the city of Boston and has been assessed in that city upon the shares owned by him in a National banking association located in the city of New York. We think the case must be governed by the principles in the decision in *Austin v. Aldermen of Boston*, 14 Allen, 359. The National banks are artificial bodies created by the laws of the United States.

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\* The material portion of U. S. Stat. of 1864, ch. 106, § 41, is as follows: "Provided, that nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person or body corporate, from being included in the valuation of the personal property of such person or corporation in the assessment of taxes imposed by or under State authority at the place where such bank is located, and not elsewhere, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State. Provided, further, that the tax so imposed under the laws of any State upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares in any of the banks organized under authority of the State where such association is located. Provided, also, that nothing in this act shall exempt the real estate of associations from either State, county, or municipal taxes to the same extent, according to its value, as other real estate is taxed."

The power of Congress to establish them arises from their being suitable instruments for the performance of functions pertaining to the National government. As such instruments, they are not subject to taxation under State authority, and although the shares in their capital stock are so far distinct from the corporations themselves as to be the subject of State taxation if such taxation is not restricted or prohibited by Congress, yet it has been expressly decided by the Supreme Court of the United States that they are "a subject-matter over which Congress and the States may exercise a concurrent power, but from the exercise of which Congress, by reason of its paramount authority, may exclude the States." *Van Allen v. Assessors*, 3 Wall. 573 (*ante*, p. 1). In that case it was held that a tax on shares in National banks was invalid, which was not levied in conformity with the stipulations in the proviso of the U. S. Stat. of 1864, ch. 106, § 41.

By the construction which was given to that proviso by this court in *Austin v. Aldermen of Boston*, Congress has thereby prohibited the assessment of taxes by any State upon the shares of a National bank established in any other State. The purpose may have been to attract banking capital, and induce the formation of National banks within those States where the rate of taxation is low.

But whatever may have been the design or motive, we can have no doubt that it is within the constitutional power of Congress to establish a National bank in any State, and to provide that its shares shall have such a local nature as to be exempt from taxation by other States; and that this power has been exercised in the present instance. *Abbott v. Bangor*, 54 Me. 540.

*Certiorari to issue.*

## COMMONWEALTH V. FELTON.

(101 Massachusetts, 204.)

*Embezzlement by officers of National banks — Jurisdiction of offense.*

A State court has no jurisdiction of the crime of embezzlement by an officer of a National bank situate within the State; and since the National Banking Act makes such embezzlement a misdemeanor, an accessory thereto cannot be indicted in a State court under a statute making an embezzlement, or the being accessory thereto, a felony.\*

**I**NDICTMENT under the statute of Massachusetts charging that one Martin, as cashier of the National Hide and Leather Bank, embezzled the funds of the bank, and that the defendant, Felton, was an accessory thereto before the fact.

The defendants filed separate pleas to the jurisdiction, alleging that the United States courts had exclusive cognizance of the offenses charged in the indictment, as against both defendants, and that they both had, before the pendency of this indictment, been indicted in the United States Circuit Court. In the Superior Court, AMES, C. J., allowed Martin's plea, but overruled the plea of Felton, who thereupon pleaded *nola contendere*, and alleged exceptions.

A. A. Ramsey, for Felton.

C. Allen, Attorney-General (J. C. Davis, Assistant Attorney-General, with him), for the Commonwealth.

AMES, J. The indictment against this defendant charges him with a crime of so grave a character, that it ought to be made a matter of judicial investigation somewhere, upon the facts and merits. But as he is indicted for the same transaction in two different jurisdictions, namely, in the Circuit Court of the United States and in the Superior Court of this Commonwealth, it becomes necessary to decide to which, if to either, of these two jurisdictions he is properly amenable; or, to state the question with more strict accuracy, whether he is liable to be proceeded against under the laws of this Commonwealth.

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\* See *Commonwealth v. Barry*, *post*, and note.

The statutes of this Commonwealth (Gen. Stats., ch. 161, § 89) have made full and ample provision for the case of the embezzlement or fraudulent appropriation by any cashier or other officer of any incorporated bank, of any of the funds of such bank. This description of crime, by our laws, is a felony, and is punishable by imprisonment in the State prison. It has recently been decided that the language of this statute is broad enough to include banking corporations organized under the laws of the United States and located in Massachusetts as well as like corporations created by the laws of this State. *Commonwealth v. Tenney*, 97 Mass. 50 (*ante*, p. 568). So far as the case depends on our own legislation, and if nothing has been done to impair the jurisdiction of our own tribunals in such a case, there can be no doubt that Martin, the cashier of the Hide and Leather National Bank, could well be indicted, and tried, in the Superior Court for embezzlement of the funds of the bank, and this defendant could also in like manner be indicted jointly with him, or separately, as accessory before the fact to the same embezzlement.

But the act of Congress (U. S. Stat. 1864, ch. 106) from which the National banks derive their existence and organization, contains a section (§ 39) which also makes full and ample provision for the punishment of the crime of embezzlement and fraudulent appropriation of any funds of a National bank by any cashier, etc., of such bank. It exactly covers the crime imputed to Martin. It declares that description of crime to be a misdemeanor, and makes it punishable by imprisonment in the State prison. It makes no provision or reservation for its prosecution and punishment by any State authority, but makes it cognizable under the authority of the United States. By the terms of the Judiciary Act (U. S. Stat. 1789, ch. 20, § 11), the courts of the United States are vested with the exclusive cognizance of all crimes that are punishable by the act of Congress, except where the act of Congress makes other provisions, and it would therefore seem that the crime of embezzlement by a cashier of a National bank located within our territory is taken out of the jurisdiction of our courts. This is at least strongly implied in *Commonwealth v. Tenney*, and in fact is conceded by the learned Attorney-General in the argument of this case. See also *Commonwealth v. Fuller*, 8 Metc. 313. If Martin, then, as a bank officer, is not amenable in our courts for embezzlement from the bank, can Felton be indicted in the

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same courts as an accessory before the fact, for the same embezzlement? The technical and somewhat narrow rule of the common law on the subject of principal and accessory has been very extensively and reasonably enlarged by modern legislation. "Whoever counsels, hires, or otherwise procures a felony to be committed, may be indicted and convicted as an accessory before the fact, either with the principal felon, or after his conviction; or may be indicted and convicted of a substantive felony, whether the principal felon has or has not been convicted, or is not amenable to justice. Gen. Stats., ch. 168, § 4. But the difficulty in the way of holding the defendant upon the present indictment is, that the act of Congress has taken the crime of the principal out of our jurisdiction. Our courts cannot deal with him upon that charge. By the terms of the same act, which in this matter is the controlling authority, the crime of the principal has ceased to be a felony, and has become a misdemeanor only — a description of a crime, in which there are no accessories. A defaulting cashier of a National bank, however flagrant his embezzlement may be, so far from being a principal felon, is not in legal strictness a felon at all; and it would seem to be impossible, therefore, to say that Felton, even if he in fact counseled, hired, or otherwise procured the crime to be committed, can be said to be thereby rendered accessory to a felony, within the terms of the above-cited statute. Gen. Stats., ch. 168, § 4. The effect of our decision may very probably be to leave what it charged as a great crime to go wholly unpunished and untried; but that is a result which we have no power to prevent.

*Exceptions sustained.*

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CROCKER V. MARINE NATIONAL BANK OF NEW YORK.

(101 Massachusetts, 240.)

*National bank — Actions against in State courts.*

A banking association organized under act of Congress, of 1864, chapter 106, can be sued in a State court, only in the city or county where it is located.\*

THE facts are stated in the opinion.

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\* See *Cooke v. State National Bank*, *post*, and note.

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*J. G. Abbott and H. C. Hutchins*, for plaintiffs.

*E. D. Sohier and C. A. Welch*, for defendant.

GRAY, J. These actions are brought, the one by citizens of New York and the other by citizens of Massachusetts, against a banking association established in the city of New York, under the act of Congress of 1864, chap. 106, entitled "An act to provide a National currency secured by a pledge of United States bonds, and to provide for the circulation and redémption thereof." The first question to be decided is that of jurisdiction; for, if the court has no jurisdiction, it has no authority to consider the merits of the actions.

The general principle is well settled, that civil cases arising under the Constitution and laws of the United States may be tried and determined in the State courts, unless the National Constitution and laws have vested exclusive jurisdiction of them in the Federal tribunals; but that Congress may prohibit the State courts from entertaining jurisdiction of such cases. 1 Kent's Com. (6th ed.) 396 *et seq.*; *Bank of United States v. Deveaux*, 5 Cranch, 85, 86; *Osborn v. United States Bank*, 9 Wheat. 738; *Teall v. Felton*, 1 Comst. 537; S. C., 12 How. 284; *Ward v. Jenkins*, 10 Metc. 591. The question in this case, therefore, depends upon the intention of Congress, as manifested in the act of 1864.

The 8th section of that act declares that every banking association, formed and organized pursuant to its provisions, shall be a body corporate, with the usual powers of a corporation, and among others, to have a corporate name and seal, and "by such name it may make contracts, sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons." If the act contained no further provision upon this subject, the corporations thus established might doubtless be sued, as well as sue, in the State courts of appropriate jurisdiction, and could be sued in only such courts of the United States as the citizenship of the parties would warrant. *Bank of United States v. Deveaux*; *Teall v. Felton* and *Ward v. Jenkins*, above cited.

But by the 5th section it is enacted that 'suits, actions and proceedings against any association under this act may be had in any circuit, district or territorial court of the United States, held within the district in which such association may be established; or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases;' provided, however, that all proceedings to enjoin the Comptroller



of the Currency under this act shall be had in a court of the United States.

The plaintiffs contend that this section, except the final proviso, is merely permissive, and does not exclude the bringing of such suits in any court, National or State, having jurisdiction in similar cases. But, according to their construction, so much of it as relates to courts of the United States would seem to have no effect, except in the case of a plaintiff residing in the district in which the association is established; and so much as relates to the State courts would seem to be wholly useless and superfluous. And the effect would be, that, while a citizen of New York could not sue this association in any Federal court held beyond the limits of that State, he might bring a suit against it in the courts of any State of the Union, by the laws of which a corporation established in another State might be sued, and in which it might be effectually served with process. *Folger v. Columbian Insurance Co.*, 99 Mass. 272.

Upon full consideration, we are unanimously of opinion that the construction of the act of Congress for which the plaintiffs contend cannot be supported, and that the opposite construction must prevail. The whole purpose of the 8th section appears to have been to clothe the association with the attributes of a corporation, including that of suing and being sued. Unaccompanied by further legislation, that would have left the jurisdiction over suits against it to be regulated, according to the subject-matter involved or the parties interested, by the existing laws of the United States, and the several States respectively. But the 57th section designates not only the judicial district of the courts of the United States, but the locality of the State courts, within which suits may be brought against such associations; and, by thus regulating the whole subject of suits against such corporations, so far supersedes all other rules, or to speak more accurately, prevents them from ever applying to such suits. This section manifests the intention of Congress that each of these associations should be sued, either in the Federal or in the State courts, only in the judicial district in which it is established, and in which its officers may be summoned and its books brought into court with the least interruption and inconvenience of its business; and that the election of plaintiffs to sue in any court whatever should be confined within these limits in all cases.

*Action dismissed for want of jurisdiction.*

## PROVIDENCE INSTITUTION FOR SAVINGS AND JEWELL V. CITY OF BOSTON.

(101 Massachusetts, 575.)

*Constitutional law — Construction of statute — Taxation of National bank shares.*

By the statute of June, 1868, chapter 349, of Massachusetts, entitled "An act concerning the taxing of bank shares," it was provided that the shares in National banks owned by non-residents of the Commonwealth shall be assessed to the owners thereof in the cities or towns where the banks are located; that the rate of taxation shall be the same as on other moneyed capital; that the value of such shares shall be omitted from the valuation upon which the rate is to be based, and that the act shall "apply to taxes assessed and collected for the present year in the same manner and to the same effect as if it had been in force on the first day of May." *Held*, that the act was not unconstitutional, either as being in violation of the act of Congress of 1864, chapter 106, section 47, and 1868, chapter 7, or as levying a tax in a disproportional manner, or as being retrospective in its operation.

**A**CTION to recover the amount of taxes paid under protest. The taxes were assessed by the assessors of Boston, under the statute of 1868, chap. 349, on shares owned by the plaintiffs, in the National Revere Bank, which was established at Boston under United States statute of 1864, chap. 106. One of the plaintiffs was a corporation of Rhode Island, the other was a citizen of Connecticut. Several of the provisions of the statute of 1868, chap. 349, are referred to in the opinion. It was also provided by the act, that it should "apply to taxes assessed and collected for the present year in the same manner and to the same effect as if it had been in force on the first day of May."

*B. F. Thomas*, for plaintiffs. 1. The shares in a bank are personal property, and follow the person of the owner. *McCulloch v. Maryland*, 4 Wheat. 316, 437; *Utica v. Churchill*, 33 N. Y. 233.

2. The tax is disproportional on account of the mode of valuation. *Oliver v. Washington Mills*, 11 Allen, 268, 275; *Commonwealth v. People's Savings Bank*, 5 id. 428, 431; *Portland Bank v. Apthorp*, 12 Mass. 252, 255.

3. The statute of 1868, chap. 349, is retrospective in its operation.

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Cases above ; *Commonwealth v. Provident Institution for Savings*, 12 Allen, 313.

4. The statute is unconstitutional because it conflicts with the Constitution of the United States, which provides that "citizens of each State shall be entitled to all privileges and immunities of citizens of the several States." See also *Corfield v. Coryell*, 4 Wash. C. C. 380 ; *Crandall v. State*, 10 Conn. 343 ; *Campbell v. Morris*, 3 Har. & McHen. 534, 535.

*C. Allen*, Attorney-General, and *C. H. Hill*, for defendants.

AMES, J. By the terms of the act of Congress of June 30, 1864 (U. S. Stat. 1864, ch. 106), under which the National banks have come into existence, all the shares in each of said banks are made taxable in the place in which the bank is "located," without any regard whatever to the legal domicile of the shareholders respectively. This provision forms a part of the organic law under which every such bank has its being, and under which the stockholders contribute to its capital. This court has recently decided that the word "place," as used in the statute, means the State within which the bank is located. *Austin v. Aldermen of Boston*, 14 Allen, 359. And the subsequent amendatory act of Congress of February 10, 1868 (U. S. Stat. 1868, ch. 7), uses the following language : The words "place where the bank is located and not elsewhere" shall be construed and held to mean the State within which the bank is located ; and the Legislature of each State may determine and direct the manner and place of taxing all the shares of National banks located within said State, subject to the restriction that the taxation shall not be at a greater rate than is assessed upon any other moneyed capital in the hands of individual citizens of such State ; and *provided, always*, that the shares of any National bank owned by a non-resident of any State shall be taxed in the city or town where said bank is located, and not elsewhere." The Legislature of this Commonwealth, by the statute of 1868, chap. 349, passed June 11th of that year, entitled "An act concerning the taxing of bank shares," has undertaken to determine and direct the manner in which all the shares of stock in banks, whether of issue or not, existing by authority of the United States, shall be taxed. The act provides, among other things, that such shares owned by non-residents of this Commonwealth shall be assessed to the owners thereof in the cities or towns where such banks are located, and

not elsewhere ; that the tax shall be a lien on their shares ; that the value of such shares shall be omitted from the valuation upon which the rate is to be based ; and that the proceeds of the tax on such shares, when collected, shall be paid over by the treasurer of the town or city to the State treasurer. The plaintiffs insist that this statute, so far as it applies to non-resident stockholders, is one which the Legislature had no right to enact ; that the tax assessed under it upon such stockholders is invalid ; and that the lien it assumes to create upon the stock cannot be enforced.

The counsel for the plaintiffs insists that three "landmarks" have been established in this broad field of inquiry, namely, that the shares of the stockholders of the National banks are distinct subjects of taxation ; that they may be assessed and taxed without deducting from their valuation that portion of the corporate capital invested in the bonds of the United States; and last, and most important of all, for the purposes of this inquiry, that, the banks being agencies of the general government in the execution of its powers and functions, the States have no power to tax their capital except under the permission of Congress. It is also established by statute that the shares are taxable in the place (that is to say, the State) where the bank is located, and not elsewhere; that the Legislature of each State may determine and direct the manner and place within such State of taxing such shares (with a restriction against oppressive and hostile taxation); and that, in the case of shares belonging to persons not residing within the State, the place of taxation shall be the city or town in which the bank is located, and not elsewhere. A citizen of Connecticut or Rhode Island, therefore, owning shares in a National bank in Massachusetts, is not to be taxed for them in Connecticut or Rhode Island. They can only be taxed in Massachusetts, a provision which relieves him of all danger of being twice taxed for the same property. *Flint v. Aldermen of Boston*, 99 Mass. 141(*ante*, p. 571). The acts of Congress in regard to such shares belonging to non-resident stockholders apparently are intended to annul, as to them, the general rule that personal property follows the person, and has no locality other than the domicile of the owner, and to attach to such shares, for some purposes, and to some extent, the local character and fixity of real estate. They are proper subjects of taxation in the town where the bank in question is located; and the Legislature of the Commonwealth (as the above-quoted act of Congress expressly provides

that it may) has, by the statute in question, determined and directed the manner in which they shall be taxed.

If the statute of 1868, chapter 349, is to be interpreted as providing for the imposition of an excise, in the proper sense of that term, and as distinguished from a tax, it would be liable to all the objections so fully pointed out in the recent case of *Oliver v. Washington Mills*, 11 Allen, 268, and could not be sustained. But the plaintiffs do not claim that it was intended to provide for an excise, in the proper sense of that term. On the contrary, they insist that it is intended to authorize a tax, and not an excise; that the act bears the title of "An act concerning the taxation of bank shares;" that "tax," and in no case "duty" or "excise," is the term used throughout the statute; that the provisions for the assessment and collection are appropriate to a tax rather than to a duty or excise, and are assimilated to the existing provisions of law for the assessment and collection of taxes on similar property; that the rate of taxation is required to be the same as on other moneyed capital; that the same form of expression is used in the statute and in the acts of Congress above cited, showing that a tax on property, and not a duty or excise on the franchise, was intended to be permitted by Congress and imposed by the State; and that the statute has not been so framed that it could be held valid either as tax or an excise, whichever its true nature might be. On the assumption, then, that this argument on the part of the plaintiffs is well founded, and that the true construction of the statute is that it is intended for taxation, and not for an excise or duty, can it be maintained as a valid exercise of power on the part of the Legislature?

The objection that it conflicts with the restrictions expressly provided for by the two acts of Congress is one which meets us at the threshold of the inquiry, and may very properly be considered first. The power of the State to tax the shares is subject to the restriction that the tax shall not be "at a greater rate than is assessed upon any other moneyed capital in the hands of individual citizens of the State." We think that this clause was obviously intended to preclude the possibility that property of that description should be singled out for special and peculiar taxation. Its operation would be, to prevent oppressive and hostile discriminations unfavorable to the banks. A State, if there were no such restrictions, might so arrange its method of taxation as substantially to expel

the National banks from its limits. It must be assumed that this system of banking was devised by the National Legislature for National purposes, as an agency of the government in the exercise of its powers and functions, and that for public reasons it was intended that it should be general and uniform throughout the country. It might well seem reasonable to Congress to take some precaution that the banks in each State should be taxed only at the same rate, and generally in the same manner, as the moneyed capital of individual citizens is taxed in the same State. The language of the act of Congress does not require the strict, literal and narrow interpretation that might be proper in the construction of a penal statute. It means, merely, as we think, that such shares shall be taxed upon a general system and in compliance with a set of rules and principles applied alike throughout the State to the taxation of all moneyed capital. It means, that the rate upon a thousand dollars, invested in such a bank, shall be the same as the rate upon a like sum put out at interest on good security; that, as far as mere taxation is concerned, the owner of the one investment shall fare neither better nor worse than the ascertained owner of the other; that banks are not to be oppressed or incommoded, nor their operations as agencies of the general government to be prevented or impeded by invidious and unfavorable rates, as compared with other property of the same general kind in the same place. A strictly literal construction of the clause would lead to such results that practically it would be a matter of almost insuperable difficulty to lay any legal tax at all upon that form of investment. If the words mean that the rate is to be the lowest that is assessed upon any moneyed capital in any part of the Commonwealth, one result would be, that the owners of bond stock would be assessed, in Boston for example, at less than the rate of taxation on other moneyed capital, or other property generally, owned by other residents of the same city. It may be assumed that generally the taxation in large cities will be at a higher rate than in rural and small farming towns. There would not only be one rate on bank stock, and another and higher rate on other property, but the assessors of Boston, before fixing upon the rate for bank stock, must inform themselves what is the lowest rate of taxation on moneyed capital in any one of the very many municipal bodies into which this State is subdivided. When they have obtained that information, on this construction of the act of Congress, they will have

ascertained the maximum rate proper to be observed in the taxation of bank stock. Then suppose that Boston, on its being ascertained that the tax on moneyed capital in some small town in the county of Berkshire, or in the county of Franklin, has been fixed at five cents on the \$100 of valuation, should adopt that same rate for the taxation of bank stock; and suppose it should happen that the assessors of the city of Worcester, for example, in order to be certain not to endanger the validity of their tax by adopting too high a rate should take the precaution to fix their rate upon bank stock at four cents and nine mills on the \$100, is the Boston tax to be thereby rendered illegal and void for being in conflict with the restriction contained in the act of Congress of February 10, 1868? Why not, if the lowest rate on any moneyed capital is the only legal rate?

Is the tax on bank stock throughout the Commonwealth to be determined and absolutely controlled by the decision of some small country village, in which there happens to be no bank, and in which the municipal wants and expenses are slight and insignificant? Yet the literal construction of the words "at a rate no greater than is assessed upon *any* other moneyed capital in the hands of individual citizens of the State" would lead to precisely this result. It is impossible to believe that such was the purpose of the act, or that such would be a reasonable and fair interpretation of its meaning. In our judgment, it satisfies the meaning of the restriction, if the rate upon bank shares is the same as the rate upon moneyed capital in the hands of individual citizens in the town or city where the bank is located.

Another objection, which is the one principally urged in the argument, is that the tax in controversy is not proportional. If this objection should prove to be well taken, the tax is illegal and void. It is not in the power of Congress to authorize the legislature to adopt a system which fails in so important and vital a particular. But in what way does this alleged want of fair proportion manifest itself, and in what does it consist? If we compare the case of the non-resident stockholder with that of those resident in the town where the bank is established, we find that they pay at exactly the same rate on their shares. If we compare his case with that of individuals, citizens of the same place, owning other moneyed capital, we find that they also pay at the same rate on their respective valuations. Suppose it to be true that they all pay at a higher rate

than would be charged if the shares belonging to non-residents were included in the valuations, yet, as they all pay at one uniform rate, there is no disproportion as among themselves. The rate in one town may be very different from the rate in the adjoining town ; but it is not necessary, in order to meet the requirement that taxes shall be proportional, that the rate shall be identical in all the very great number of municipal corporations throughout the State. Each town determines for itself what amount of expenditure its wants require, or its valuation and local circumstances will justify ; and, of course, the rates differ very widely in different places, yet they have never been called in question as not being proportional, on account of discrepancies of that nature. We do not understand that there is any complaint that one set or class of stockholders in banks is taxed on a different system from the rest ; or that there is any want of due proportion among the stockholders, as compared with each other, or with other individuals owning moneyed capital. The proportion, on which we understand the plaintiffs to insist as the only constitutional and legal basis on which taxes can be assessed, is that which the whole amount to be raised by taxation, under the description of State, county and municipal taxes, bears to the entire amount of all the property taxable within the Commonwealth. How stands the case in view of this objection ?

If our statute of 1868, chapter 349, had simply provided that the tax on bank shares belonging to persons not residing within the State should be paid into the treasury of the town or city where the bank is, and should make a part of the funds of such town or city ; in other words, if such shares were included in the valuation, and taxed as the real estate of non-resident owners is taxed, the case would present no difficulty, or, rather, the case would not have arisen. But the statute requires that the value of such shares shall be omitted from the valuation upon which the rate is to be based ; and also that the taxes upon such shares, though paid in the first instance to the treasurer of the town or city where the bank is, shall be accounted for by him to the State treasurer, and appropriated to the use of the Commonwealth. The effect of the statute, then, will be that the whole amount of the State, county and town taxes (so far as they affect property and not polls) is levied upon the whole amount of taxable property in the State, except only the shares of non-resident stockholders in the National banks established within the State. That is to say, the whole of the property tax,



falling within that qualification, is imposed upon only a part of the taxable property of the Commonwealth ; a large part, undoubtedly, but confessedly only a part. The plaintiffs claim that the rate of taxation is higher and the tax larger, to each individual tax payer, than they would be if literally the whole of the taxable property were charged with the whole of the tax.

As we understand the argument in behalf of the plaintiffs it may be illustrated in this manner : Suppose the whole amount of the property, which, by the terms of the statute, is to be omitted from the general valuation forming the basis of taxation, to be sufficiently large for its omission to diminish that valuation to such an extent that, in order to raise the whole amount of the taxes, it should become necessary to increase the rate of taxation from four cents on each \$100 to five cents. Of course these figures are here taken arbitrarily, merely for the purpose of illustration, and without any attempt to approximate to the exact state of the facts. Assuming these figures, we should have the taxes upon property included in the valuation apparently twenty-five per cent higher than they would be under a system requiring the whole of the taxable property to pay the whole of the property tax. This same rate, made by the operation of the statute, as the plaintiffs insist, to stand at twenty-five per cent above the true constitutional ratio, and its true and legal proportions, is then imposed by the statute upon the shares belonging to non-resident owners. And the plaintiffs insist that, whatever may be the state of things among the stockholders as compared with each other, the rate and the amount both are not in that ratio to the taxable property which alone is recognized by the Constitution as the true and just proportion.

It is quite apparent that this objection, if well founded, is very far from being peculiarly applicable to the case of non-resident owners of bank stock. If the fact that the whole amount of the property taxes is levied upon less than the whole amount of taxable property is a valid objection, it is sufficient to vitiate the whole tax. The owners of bank stock, moneyed capital, or in fact, of any other description of taxable property included in the valuation, would apparently have as much reason to complain of the disproportion as the non-resident owners of bank stock. If the principle of assessment should prove to be erroneous and vicious, and prohibited by the terms of the Constitution, the tax is all wrong,

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from beginning to end, and cannot be enforced against owners of bank stock, whether resident or not resident in the State, nor in fact against any owners of property whatever.

It is true, that under the operation of the statute, a part only of the taxable property of the Commonwealth is made to pay the whole of the county tax, the city and town tax, and also the whole amount of what is annually voted by the Legislature specifically as the State tax, so far as these three descriptions of tax are assessed upon property and not upon polls. The money obtained from the assessment of bank stock belonging to non-resident owners does not make any part of either one of these three descriptions of tax. But, although not known as the State tax *eo nomine*, it is nevertheless a tax for the use and benefit of the State. It goes into the public treasury, and makes a part of the annual ways and means of the State. The effect of the statute, if carried out, would be to furnish the Commonwealth with a regular source of income capable of making a valuable addition to the public revenue, varying perhaps somewhat from year to year, but not subject to any violent or sudden fluctuations, and generally admitting of a reasonably close estimate in advance. We are bound judicially to know the fact that the large amounts annually appropriated by the Legislature for the payment of the expenses of the Commonwealth are mainly supplied by the imposition of the State tax. We are bound also to assume that, in determining the amount of that State tax, the Legislature takes into consideration all the sources of income, from any quarter, which the State has at its command, including among them the tax provided for by this statute, and that the general State tax annually voted is intended to cover deficiencies of revenue, and to provide the necessary ways and means for the varying exigencies of the public service. The acts of Congress have made certain property taxable here, which without these acts might not be so taxable. They have also permitted the Legislature to determine and direct the manner of such taxation. This it has undertaken to do by a statute which provides that the new taxation shall be so managed as to inure wholly to the benefit of the State treasury, and not be applied to merely local and municipal purposes. The statute assumes that, to the stockholder not residing within the State, the appropriation of such a tax is a matter of no interest or importance. It does not concern him, so long as the amount is ascertained on the same principles and the tax is assessed at the

same rate as it would be if he resided in the city or town where the bank is established.

We do not understand the plaintiffs to deny that their shares are proper subjects of taxation in Boston, or to complain that there is any disproportion in the taxation of resident and non-resident shareholders in the same place, as compared with each other. The objection is, that by the operation of the statute they are made taxable at a higher rate, and so for a larger amount, than they would be if they were included in the valuation upon which the rate is to depend. Is this complaint well founded? It is to be remembered that whatever amount may be added to the public revenue by the operation of the statute diminishes to exactly the same extent the amount necessary to be raised by the State, properly and technically so called. The annual resolve for the assessment of a State tax is what, in parliamentary language, is usually called a "deficiency bill." Suppose that, after considering all sources of income other than taxation, the Legislature should find that the sum of \$1,200,000 is needed to cover the public expenditures of the State, and that the tax on bank shares belonging to non-residents and provided for in the terms of the statute, would produce the sum of \$200,000 annually? And here it may be repeated that these figures are assumed arbitrarily, and merely as illustrative of the argument. Upon these figures a tax of \$1,000,000 would supply the deficiency. But, if the statute were to be repealed or pronounced unconstitutional and void, and the law so far changed that the bank shares belonging to non-residents should be included in the municipal valuations, and taxed as other property of the same kind is taxed, the State would lose from its annual revenue the sum of \$200,000. The valuations which form the basis of taxation would be increased by the addition of property producing \$200,000 in taxes annually. The county and municipal taxes, not being increased, would be assessed upon a larger amount, and of course at a lower rate; but the State tax, on the other hand, would be raised from \$1,000,000 to \$1,200,000. The general result would be, that the tax payers would pay exactly what they did before, with not the slightest change of rate or proportion. In either mode of taxation, the taxable property would pay into the treasury of the State exactly the same sum, namely, \$1,200,000. The non-resident stockholders, as a class, do not appear, then, to have any cause to complain that the tax upon them as such, under our statute, is not proportional; and we find

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nothing in the agreed facts that distinguishes these plaintiffs from other non-resident owners generally.

There is a provision in the statute, that, in assessing such shares, there shall be a deduction of a proportionate part of the value of the real estate belonging to the bank. To that extent the non-resident stockholder is privileged and favored, as there seems to be no law requiring or permitting any such allowance in favor of stockholders residing in the State. This disproportion was not alluded to in the argument, and no importance, as we suppose, was intended to be attached to it. It certainly is not one of which these plaintiffs can reasonably complain.

The conclusion, then, at which we arrived is that the statute of 1868, chapter 349, does not transcend or conflict with the limitations expressly set forth in the acts of Congress; that practically, it produces no appreciable disproportion among tax payers as compared with each other; that the omission of the shares of non-residents from the town valuations produces no actual want of due proportion, for the reason that the general result of the taxation, supposing the statute to be held valid, is substantially identical, to each tax payer, with what it would be if the shares of non-residents were included in those valuations, and taxed in the same manner in all respects as the real estate of non-resident owners is taxed; and that, although in one mode of proceeding the sum total of the valuations is less than in the other, yet the aggregate of the amount to be raised under the heads of county, municipal and State taxes is diminished in exactly the same proportion.

As to the objection that it is retrospective in its operation, it seems to be enough to say that, under the acts of Congress, the property was certainly taxable in such lawful manner as the Legislature of the Commonwealth should direct. Whoever, then, on the 1st day of May, 1868, held such property knew, or was bound to know, that it was taxable like other moneyed capital as of that day, in such manner as by law might be provided.

We do not find, in the various objections taken on behalf of the plaintiffs, and so ably and forcibly urged by their learned counsel, any thing that convinces us that the statute ought to be pronounced unconstitutional, or that the tax imposed in pursuance of it is unlawful and void. And according to the terms of the agreement there must be, in each case,

*Judgment for the defendant.*

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## Hungerford National Bank v. Van Nostrand.

## HUNGERFORD NATIONAL BANK v. VAN NOSTRAND.

(106 Massachusetts, 550.)

*National banks — Evidence of incorporation in suits by.*

In an action by a National bank against the maker of a promissory note, the fact that the note is made payable at the plaintiff bank is not conclusive evidence that such bank is a corporation.\*

CONTRACT by the Hungerford National Bank, alleged in the writ to be "a corporation duly established by law at Adams, in the State of New York," on two promissory notes signed by the defendants, each "payable at Hungerford National Bank, Adams," to the order of Rufus P. White, and by him indorsed to the plaintiffs. The answer denied all the allegations of the declaration.

At the trial in the Superior Court, before LORD, J., the signatures of the defendants and of White on the notes were admitted, and there was some evidence, which it is unnecessary to state in detail, that the plaintiffs were a corporation, and also other evidence now immaterial. The defendants contended that the plaintiffs were not a corporation.

The judge ruled "that there was sufficient evidence for the jury to find the organization for the plaintiff corporation;" "that the whole evidence was insufficient to show either payment of the notes, or that the plaintiff took them subject to the equities between the original parties; and that there was not sufficient evidence in the case to warrant the jury in finding a verdict for the defendants;"

\* In *Washington County National Bank v. Lee*, 112 Mass. 521, a National bank brought an action, describing itself as "the Washington County National Bank, a corporation duly established by law, and doing business in Greenwich, in the State of New York," and to prove its corporate existence, introduced an organization certificate of "The Washington County National Bank of Greenwich," to "be located . . . in the town of Greenwich, county of Washington and State of New York," and a certificate of the Comptroller of the Currency that "the Washington County National Bank of Greenwich, in the county of Washington, and State of New York," had been duly organized. *Held*, that in the absence of evidence of the existence at Greenwich of another bank named "the Washington County National Bank of Greenwich," the evidence would warrant the inference of the plaintiff's due organization. See *Thatcher v. West River Nat. Bank*, *post*.

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First National Bank of Rochester v. Harris.

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and ordered a verdict for the plaintiff for the amount of the notes and interest. The defendants alleged exceptions.

*N. Morse*, for defendants.

*G. W. Ware, Jr.*, for plaintiffs.

WELLS, J. The answer put the plaintiff to the proof of every fact necessary to the maintenance of the action. One fact to be proved was the organization or corporate existence of the plaintiff. There was some evidence upon that point, but it was not conclusive, so as to enable the court to determine it as a matter of law. The notes were not made payable to the bank as a party. The bank is mentioned only as the place of payment. That does not necessarily indicate a corporation established under that name.

In ordering a verdict for the plaintiff, the court, no doubt inadvertently, overlooked this question of fact, which, upon the evidence in the case, the burden being upon the plaintiff to establish it, must necessarily be submitted to the jury.

*Exceptions sustained.*

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FIRST NATIONAL BANK OF ROCHESTER v. HARRIS.

(108 Massachusetts, 514.)

*National banks may buy checks — Delay in presenting check for payment.*

A National bank has authority to buy checks of individuals on other banks, whether payable to bearer or to order.\*

A check drawn in Boston on a bank in Boston was sent by mail to Rochester, N. Y., and there bought by a National bank four days after its date and two days after was presented for payment. *Held*, that there was no unreasonable delay, and that the buyer was not subject to equities existing between the original parties.

**A**CTION by the First National Bank of Rochester against Harris & Company on a check drawn by the defendants on the Second National Bank of Boston, payable to the order of Johnson & Company and indorsed in blank by them.

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\* See *First National Bank of Rochester v. Pierson*, *post*.

The defendants alleged that Johnson & Company had obtained the check from them through fraud and without consideration; that it was overdue when indorsed to plaintiff and subject to the equities between the original parties; that it had not been duly presented for payment and that they had not had due notice of non-payment.

At the trial in the Superior Court, before DEVENS, J., without a jury, it was agreed "that plaintiffs are a corporation duly organized under the laws of the United States; that on Thursday, November 10, 1870, the defendants signed the check, and sent it by mail to H. Johnson & Company in Rochester, New York; that H. Johnson & Company indorsed it and delivered it to the plaintiffs; that the plaintiffs received it on Monday, November 14, 1870, without actual or implied notice of any defect in the title of the indorsers to it, and at the same time paid the face of the check after deducting one-eighth of one per cent; that H. Johnson & Company never kept an account at, and never were depositors with, the plaintiffs' bank; that on November 16, 1870, the plaintiffs duly presented the check to the Second National Bank of Boston for payment, which was refused; that due notice of its non-payment was given to defendants; that the check has not since been paid; and that the defendants have a good and valid defense to any action on the check, brought against them by H. Johnson & Company." It was not agreed whether the plaintiffs bought the check from H. Johnson & Company on said November 14, or received it from them for collection only; but the judge found that they bought it.

It further appeared that on November 18, 1870, Henry S. Billings sued H. Johnson & Company in a trustee process in the Superior Court in this county, and summoned these defendants on that day as trustees therein; and that the suit is still pending.

By consent of the parties, the judge reported the case for the determination of this court on these facts.

*W. P. Walley*, for plaintiffs.

*W. H. Twone*, for defendant.

CHAPMAN, C. J. We cannot doubt that the plaintiffs had authority to buy checks. The power conferred on National Banks by the U. S. statutes of 1864, chapter 106, section 8, expressly confers it, in the clause which authorizes them to discount and negoti-

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ate promissory notes, drafts, bills of exchange and other evidences of debt. Dealing in checks is also a part of the usual business of banking, and would be within the general powers of a bank, without special mention. Nor is there any difference, in this respect, between a check payable to bearer and one payable to order. Nor does section 10 of the General Statutes, chapter 53,\* apply to checks, either by its terms, or by its object.

The plaintiffs appear to have bought the check in question in good faith, and presented it for payment in two days thereafter; and this does not appear to have been an unreasonable delay, considering the relative situation of the parties. Thus the case is governed by the case of *Ames v. Meriam*, 98 Mass. 294, and the plaintiffs are not subject to the defense set up.

The action of Billings against Johnson and these defendants as his trustees cannot affect these plaintiffs; for they were not parties to it, and their rights, as against the defendants, were fixed before the action was brought.

*Judgment for the plaintiffs.*

## GOLDSBURY V. INHABITANTS OF WARWICK.

(112 Massachusetts, 384.)

*Taxation — Construction of State statute — place of taxation.*

A statute made it the duty of every shareholder in a National bank to give notice to the bank of his true residence each year, and, in case of neglect, made the shares taxable where the bank was located as well as where the shareholder resided. *Held*, that a shareholder was rightfully taxed upon his shares in the town where he resided although he had, through an honest mistake, notified the cashier that his residence was in another town.

**A**CTION to recover back the amount of tax assessed on plaintiff for shares in a National bank owned by him. At the trial the plaintiff offered evidence tending to show that although for-

\* "In any action by an indorsee against the promisor, brought upon a promissory note made after the sixth day of May, eighteen hundred and thirty-nine, and payable on demand, any matter shall be deemed a legal defense which would be a defense to a suit thereupon if brought by the promisee; provided that no matter arising after notice of the indorsement or transfer of such note is given to the promisor shall constitute a defense.



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merly a resident of Warwick, she was a resident of Bernardston, and that she had so notified the bank. The defendants insisted that she was a resident of Warwick.

Upon notice to them, the defendants produced a printed document, sent to them by the tax commissioner, purporting to be a list of all the shareholders in the several National banks of this Commonwealth, with their residences, by which it appeared that the plaintiff was returned as the owner of these shares and as resident in Bernardston. This document was put in evidence against the objection of the defendants.

The presiding judge ruled, that under the Statute of 1872, chapter 321, in order to render the plaintiff liable to taxation for the bank shares aforesaid, in Warwick, the burden was on the defendants to show that the statement made to the cashiers by the plaintiff, as to her residence in the town of Bernardston, was intentionally false; and the jury having returned a verdict for the plaintiff, he reported his rulings to this court for determination.

*D. Aiken*, for defendants.

*W. S. B. Hopkins*, for plaintiff.

COLT, J. The Statute of 1872, chapter 321, providing for the collection of taxes upon bank shares, contains provisions for ascertaining and certifying to the assessors of the several cities and towns the true residence of every stockholder. To that end, it is made the duty of every shareholder to give notice to the bank of his true residence each year. If he refuses or neglects to do this, his shares are made subject to taxation in the city or town where the bank is located as well as in the city or town where he resides.

The plaintiff gave notice to the banks in which she held shares that her residence was then in Bernardston, and would continue there until she should inform them to the contrary. She was taxed for these shares in Warwick, the place of her former residence, and seeks in this action to recover back the amount paid under protest.

It was ruled that under the statute, in order to render the plaintiff liable to taxation on these shares in Warwick, the burden was on the defendants to show that the statements made to the banks by the plaintiff as to her residence in Bernardston was intentionally false.

The defendants' objection to this ruling is well taken. The actual residence of the shareholder fixes the place where he is liable to be taxed. It is easy and simple in most cases to determine as a matter of fact where that residence is. The actual facts are ordinarily so decisive that no declared intention will be permitted to control them. It is only where the facts are ambiguous and uncertain in the absence of any settled and permanent abode, that a party will be permitted to elect in which of one or more places of partial residence he will exercise his rights of citizenship and subject himself to taxation. To this extent weight is given to expressed intention without impairing the rule that in all cases, in order to establish a change of domicile, the actual fact of residence and the intention must concur. *Hallett v. Bassett*, 100 Mass. 167, 171.

The construction of the statute contended for sets up a new rule of evidence, changing the burden of proof, and applicable only to questions of residence as affecting liability to taxation for bank shares. It puts it in the power of the shareholder practically to fix his residence by a statement of his intention in that respect, unless it can be shown that the statement was intentionally false, and this without reference to the actual facts of his residence. It is enough if he is honestly mistaken in deciding a question which is sometimes difficult as to which there is much misapprehension. His decision must stand as conclusive unless impeached as intentionally false.

There is no difficulty in giving effect to all the provisions of the statute without adopting an interpretation which leads to such results. Its purpose is to provide for bringing to the knowledge of the assessors the actual ownership of property of this description. It secures this by requiring notice of residence to be given by the shareholder to the bank, to be transmitted by the bank to the assessors. It attempts to insure a compliance with its provisions by subjecting the shares to double taxation in case of a refusal or neglect on the part of the owner to make the required statements. But it expressly declares that they shall not be exempt from the payment of a tax legally assessed in the city or town where the owner resides. This leaves the question of residence to be settled by the usual rules, giving no more weight to the statements contained in the notice required by section 6 as evidence than would be given to it as an expression of intention by the rules

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above stated. It is not necessary to inquire whether the double taxation of the statute can be enforced against one who has, without intention, incorrectly stated the place of his residence. It is enough that, between these parties, the rules of evidence are not affected. The question of the admissibility of the document produced by the defendants on notice, or of the validity of the plaintiff's notice to the banks, it is not necessary to consider.

*New trial ordered.*

## CENTRAL NATIONAL BANK V. PRATT.

(115 Massachusetts, 539.)

*National bank not governed by State Usury Laws.*

It is within the constitutional power of Congress to fix the rate of interest which a National bank may take upon a loan of money and to determine the penalty to be imposed for taking a greater rate, and such power, when exercised by Congress, is exclusive of State legislation.

The provision of the National Banking Act, limiting the forfeiture for the making usurious charges by National banks to the interest, applies as well to banks established in States where a rate of interest is fixed by law, as to banks in States where no rate is fixed.

The laws of New York imposing penalties for taking usury do not apply to National banks established within the limits of that State.\*

CONTRACT by a National bank organized under the National Banking Acts of the United States, and having its place of business in the city of New York, against the indorser of a bill of exchange drawn by Joseph M. Strong of New York upon Matt Ellis of Boston, payable to the order of the defendant, and by him indorsed to the plaintiff, and accepted by Ellis. Trial in the Su-

\* In *First National Bank of Whitehall v. Lamb*, 50 N. Y. 95, decided by the Court of Appeals of New York, in 1872, it was held that National banks, located in the State of New York, were subject to the usury laws of the State; and this decision was followed in *Farmers' Bank v. Hale*, 59 N. Y. 53, but these decisions were subsequently overruled by the Supreme Court of the United States in *Farmers and Mechanics' Bank v. Dearing*, ante, p. 117, and by the Court of Appeals in *Hintermister v. First National Bank*, 64 N. Y. 212 (post).

That National banks are not bound by the usury laws of a State was also held in *First Nat. Bank v. Garlinghouse*, 22 Ohio St. 492; S. C., 10 Am. Rep. 751.

perior Court, before DEVENS, J., who reserved the case for the consideration of this court on the following report :

“ The bill of exchange was discounted by the plaintiff in New York on the day of its date, upon presentation for discount by said Strong. It was agreed by the defendant at the trial that the plaintiff was entitled to recover, unless the plaintiff took or reserved a greater rate of interest for discounting said bill than seven per centum per annum, and unless the bill of exchange was void by virtue of the laws of the State of New York against usury. The defendant’s answer set up that in discounting the bill of exchange, the plaintiff lent to the drawer a sum of money for which it received usurious interest contrary to the laws of New York, and that, by so doing, the bill of exchange was void.

“ The plaintiff contended that the laws of New York against usury were controlled by the National Banking Acts, and that the bill of exchange sued upon would not be void even if usurious interest had been reserved or taken by the plaintiff in discounting said bill ; and this question is reserved, at the request of both parties, for determination by the Supreme Judicial Court. If the court shall hold that such usury does not render the bill of exchange void then judgment is to be rendered for the plaintiff ; if such usury does render the bill of exchange void, the case is to stand for trial in the Superior Court.”

*D. E. Ware and J. T. Morse, Jr., for plaintiff.*

*E. Avery and R. C. Lincoln, for defendant.*

MORTON, J. The 30th section of the act to provide a National currency is as follows : “ Every association may take, receive, reserve and charge on any loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate allowed by the laws of the State or territory where the bank is located, and no more, except that, where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized in any such State under this act. And when no rate is fixed by the laws of the State or territory, the bank may take, receive, reserve or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill or other evidence of debt has to run. And the

knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid, shall be held and adjudged a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of the interest thus paid from the association taking or receiving the same. Provided that such action is commenced within two years from the time the usurious transaction occurred. But the purchase, discount or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange for sight drafts in addition to the interest, shall not be considered as taking or receiving a greater rate of interest." U. S. Stat. 1864, chap. 106, § 30.

The first question in this case is as to the true construction of this section. The defendant contends that in the provision that "the knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid, shall be held and adjudged a forfeiture of the entire interest," the word "aforesaid" refers only to the rate established by the paragraph immediately preceding, "when no rate is fixed by the laws of the State or territory." If this be so, then the act of Congress provides no penalty for taking usurious interest when the rate of interest is fixed by the laws of the State or territory where the bank is located, and the defendant contends that the penalty is to be determined by the laws of the State. On the other hand, if the true construction of the statute is, that the penalty therein provided applies uniformly to all banks which take more than a legal rate of interest, it is clear that it supersedes the State law so far as repugnant to it. It cannot be contended that Congress intended to expose banks located in States wherein the rate of interest is fixed by law, to a double penalty; but if the act imposes a uniform penalty upon all banks, this excludes the power of the States to legislate upon the same subject, and annuls or renders inoperative the State laws in their application to banks established under the act.

In construing statutes it is to be assumed that the framers intended the meaning which the words used naturally convey to the reader. And this rule determines the construction unless there be found something in the context, or in the nature and relations

of the subject-matter, which clearly shows a different intention. In the act in question it seems clear to us that, by the natural and obvious meaning of the language, the penalty of a forfeiture of the entire interest applies to all cases where a rate of interest is charged by any bank greater than the rate which the bank is authorized to take by the previous provisions of the section. The expression "a rate of interest greater than aforesaid" refers as well to the rate established by adopting the rate allowed by the laws of the States or territories, as to the rate fixed at seven per cent if no rate is fixed by such laws. There is no rule of grammatical construction which limits its reference to the paragraph immediately preceding. We think, in view of the whole act, that the policy of Congress clearly was to keep within its own control the penalties to be imposed upon the banks for violating the provisions of the act. This view is confirmed by the history of the legislation upon this subject. The original Currency Act, of February 25, 1863, of which the act of 1864 is a revision and amendment, provided that every association might charge such rate of interest as was the established rate in the State where it was located, and that the charging a greater rate should be held a forfeiture of the debt, thus making the rate conform to the laws of the State, but establishing a fixed and uniform penalty for a violation of the act, and showing that it was the policy of the legislation upon this subject to keep the matter of the penalties to be imposed upon the banks for usurious transactions within the control of Congress.

It seems to us, therefore, that considering the natural meaning of the language, the context, and the history of legislation, by the only reasonable interpretation of this section, a bank located in a State wherein the rate of interest is fixed by its laws, which takes a greater rate of interest, is subject to the penalty of a forfeiture of the entire interest provided by the act, and is not subject to a greater or different penalty provided by the State laws against usury.

The defendant also contends that the provision, thus construed, exceeds the constitutional powers of Congress, and is invalid.

It is settled, as a judicial question, that the Constitution confers upon Congress the power to establish a bank or a system of banks, as necessary instrumentalities for executing the powers expressly given it and performing the duties imposed upon it. This was decided by the Supreme Court of the United States in 1819, in the case of *M'ulloch v. Maryland*, 4 Wheat. 316. Chief Justice MAR-

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SHALL, in delivering the opinion of the court, puts the case upon the ground that a National bank was a convenient, useful and essential instrument in the prosecution of the fiscal operations of the government.

In the later case of *Osborn v. United States Bank*, 9 Wheat. 738, 859, the question was reconsidered, and the doctrine reaffirmed, that a National bank was an instrument which was necessary and proper for carrying into effect the powers vested in the government; that Congress had the power to create a bank for National purposes and to endow it with such faculties and functions as were necessary to enable it to effect its object, and that among these is the faculty of lending and dealing in money.

The precise question in these cases was as to the right of a State to tax the National bank, but the principles upon which this question was decided are decisive of the case at bar.

The power of the government to create a bank is supreme; from its nature it includes the power to endow it with all such faculties as are appropriate to accomplish its object. It is clear, as stated in *Osborn v. United States Bank*, *supra*, that the faculty of lending and dealing in money is an appropriate and necessary faculty for a bank, and that without it the bank would want the capacity to perform its public functions in the most efficient manner. The rate of interest to be charged for the use of money is a necessary incident of a loan, and the power in Congress to authorize a bank to lend money involves the power to fix the rate of interest and the penalty for taking a greater rate. If a State may fix the rate of interest, it may practically destroy this faculty of the bank. The power to create a bank includes the power to fix the limitations within which it may exercise its functions and faculties, and to determine the causes for which and the manner in which it may be destroyed. This power vested in Congress is inconsistent with a power in any State or territory to affix penalties upon the bank for taking unlawful interest or for any other violation of the act of Congress. We are of opinion that it was within the constitutional power of Congress to fix the rate of interest which a National bank might take upon a loan of money, and to determine the penalty to be imposed for taking a greater rate; that such power, when exercised by Congress, is exclusive of State legislation; that the provision of the 30th section of the act of Congress we are considering, imposing a penalty for taking unlawful interest, applies as

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well to banks established in States where a rate of interest is fixed by law, as to banks in States where no rate is fixed, and therefore that the laws of New York imposing penalties for taking usury do not apply to National banks established within its limits. The Supreme Court of Ohio has taken the same view of the constitutionality and construction of the statute which we entertain. *First National Bank of Columbus v. Garlinghouse*, 22 Ohio St. 492; S. C., 10 Am. Rep. 751. We are aware that the Court of Appeals of New York has decided differently upon both points. *First National Bank of Whitehall v. Lamb*, 50 N. Y. 95; S. C., 10 Am. Rep. 438. But, notwithstanding the great respect we have for that eminent tribunal, we are unable to concur in the conclusions it reached.

*Judgment for plaintiff.*

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DAVIS V. RANDALL.

(115 Massachusetts, 547.)

*National banks — Usury — Accommodation acceptance — Evidence.*

The provisions of the United States Statutes of 1864, chapter 106, section 30, imposing penalties upon National banks for taking usury, supersede the State laws upon that subject.

It is no defense to a suit against the acceptor of a draft which has been discounted, and upon which money has been advanced by the plaintiff, that the draft was accepted for the accommodation of the drawer.

Even if it is within the authority of the president of a National bank to bind the bank by an agreement, with the acceptor of a draft which is discounted by the bank, not to enforce the draft against him, yet oral evidence of such an agreement is not competent, in defense of a suit by the bank against the acceptor.

**C**ONTRACT against the acceptor of two bills of exchange. Trial in the Superior Court, before DEVENS, J., who reported the case for the consideration of this court, in substance as follows: The plaintiff, to maintain the issues on his part, proved that the Ocean National Bank, of the city of New York, a National banking association, formed pursuant to the laws of the United States, and located in the city of New York, having failed to redeem its



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circulation notes when payment thereof was legally demanded at the office of said association, he was, on December 12, 1871, duly appointed by the Comptroller of the Currency of the Treasury Department of the United States receiver of said Ocean National Bank; that he accepted said office, took possession of the assets of the bank, and that the drafts in suit had come into his possession as such receiver as part of the assets of said bank; that William B. Fiske & Company, a firm doing business in New York city, made the bills and drafts in suit payable to their own order, and indorsed the same to said Ocean National Bank, presenting the same for discount at New York city, accepted by the defendant; that said bank discounted one of the drafts for \$684.11, on September 16, 1871, and the other for \$843.07, on November 11, 1871, and passed the proceeds to the credit of said W. B. Fiske & Co., less the discount; that said drafts were severally unpaid. The drafts were put in evidence, and the plaintiff rested his case.

The defendant, to sustain the issues on his part, proved, under objection, the evidence being admitted to be considered if competent, that on or about August 1, 1871, said firm of W. B. Fiske & Co. obtained a loan of \$5,000 of said Ocean National Bank, through C. S. Stevenson, its president, and secured the same by a mortgage to the bank of real estate to the amount of \$5,000, agreeing to pay twelve per cent per annum, the rate required by said bank for said loan; that the amount of said loan was passed to the credit of said W. B. Fiske & Co., who were entitled to draw the same at sight; that on applying to the bank for the money on said loan, the bank, through its president, requested Fiske & Co. not to draw out said loan at once, but to present drafts or bills to said bank on sixty and ninety days, or other short periods, as they might need the money, up to said \$5,000, so that the same would look more bankable, and that said bank would discount the same at the rate of twelve per cent per annum, and keep on discounting drafts as fast as the same matured; that Fiske & Co., in order to oblige or accommodate the bank, through its president, in this respect, agreed to avail themselves of the loan in this way, but informed the president that such paper would have to be accommodation paper; that they knew several parties, amongst others the defendant in this action, who might be willing to accept for their accommodation, but it must be understood and agreed by the bank that the parties so accepting drafts or bills were not to be looked to for

payment, or to be held liable thereon in any way; but the bank must look to its mortgage security for the amounts received by said firm on said bills or drafts, so to be presented to said bank for discount, and that the acceptors must be informed of this arrangement to induce them to accept; that the president replied all right, the bank will discount such paper for you; that thereafter Fiske & Co. informed the defendant fully of the loan secured by mortgage, and of the understanding and agreement with said bank as above stated, and Fiske & Co. solicited the defendant to accept drafts to be drawn by said firm upon the defendant, informing him the bank had agreed not to look to him for payment in any way, and knew that his acceptances were to be wholly for accommodation; that the defendant, having no business relations with Fiske & Co., and being in no ways indebted to them, and having no effects of said firm in his possession or control, and solely for the accommodation of Fiske & Co., and to enable said firm to oblige the bank in the respect above stated, and to avail of said loan, and believing and relying on the fact that he was not to be called upon for payment as acceptor or otherwise by said bank or any other person, did accept in all some four or five bills or drafts, at different times, including the two drafts in suit.

The manner of acceptance was as follows: Drafts or bills with the amounts for which same were drawn, and on which the name of W. B. Fiske & Co. did not exist, were by Fiske & Co. presented to the defendant, and the word "accepted," with the defendants' name, were written thereon, the same returned to Fiske & Co., and thereafter Fiske & Co. filled up said drafts, putting in dates, making them payable to their own order, signing, indorsing and delivering the same to said bank for discount, the president knowing the drafts had been accepted by the defendant for accommodation under said arrangement, and the bank never sending any drafts to the defendant for acceptance at any time, or having any correspondence with the defendant; that all the drafts accepted by the defendant, except those in suit, had been taken up or paid by Fiske & Co. at maturity, and that the defendant had never been called upon to pay the same, or had paid the same in any way, the defendant regarding and believing his acceptance would be the last he should hear of the same; that the drafts or bills in suit were sent to him for collection after said bank had failed, or gone into the hands of the plaintiff as receiver, and that, when called upon

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for payment, he declined to pay the same on the ground that his acceptance was for the accommodation of Fiske & Co.; that he had no funds of theirs, and that the Ocean Bank had agreed not to look to him for payment; that the whole amount obtained by Fiske & Co. on bills discounted by said bank, including these in suit, was about \$5,000, the amount of the original loan, and that the receiver of the bank still holds the mortgage given by Fiske & Co. as part of the assets of said bank; that the defendant had never received any consideration, payment, benefit or advantage, in any way for his acceptances, nor held any security indemnifying him for the same from any one.

That all drafts on which his name appeared as acceptor, including those in suit, were presented by Fiske & Co., and were discounted by said bank in the city of New York. The defendant further proved that at the times of the discount of the bills or drafts in suit, the rate of twelve per cent per annum was demanded by said bank and agreed to be paid by said Fiske & Co. on the discount of same by said bank; that seven per cent was deducted at the time of their discount, and thereafter, and before the maturity of either, and on November 23, 1871, the bank sent to Fiske & Co. for the additional five per cent, which was paid by said firm, making twelve per cent in the whole, paid on the loans or discounts on said bills or drafts.

That under the laws of the State of New York, seven per cent per annum is the legal rate of interest, and that all bonds, bills, notes, assurances, conveyances, all other contracts or securities whatsoever, except bottomry and respondentia bonds and contracts, and all deposits of goods or other things whatsoever, wherefore or whereby these shall be reserved or taken, or agreed to be reserved or taken, any greater sum or greater value for the loan or forbearance of any money, goods or things in action, than is above prescribed (seven per cent), shall be void; and the statute being an act to prevent usury, passed May 15, 1837, relating thereto, was read in evidence to the jury and may be referred to.

The plaintiff not controverting the evidence on behalf of the defendant as to the circumstances under which the notes were indorsed and negotiated, and it appearing that no fact was in dispute between the parties, the presiding judge directed a *pro forma* verdict to be entered for the plaintiff for the amount of the drafts, and reported the case for the consideration of this court, such ver-

dict to stand or be amended to a verdict for the defendant as this court should determine.

*C. M. Reed*, for plaintiff.

*G. H. Randall*, *pro se*.

MORTON, J. The defense that the drafts in suit are void, under the laws of New York against usury, cannot be sustained. The act of Congress to provide a National currency supersedes the State laws upon this subject so far as applicable to National banks. U. S. Stat. 1864, chap. 106, § 30 ; *Central National Bank of New York v. Pratt*, *ante*, p. 595.

The other defense relied upon is, in substance, that the defendant accepted the drafts in suit for the accommodation of W. B. Fiske & Co., and that before they were accepted the president of the bank orally agreed that the defendant should not be called upon to pay the drafts, but the bank would look to other securities which it held.

The fact that the defendant accepted the drafts for the accommodation of the drawers is immaterial. They were discounted by the bank and the money advanced upon them. This was a sufficient consideration for the acceptance, and the defendant is liable as acceptor, unless the alleged agreement not to enforce them against him is a defense. But, if it was within the authority of the president to bind the bank by such an agreement (which need not be decided), we are of opinion that oral evidence of such agreement is not competent. It violates the rule of law that oral evidence is not admissible to control or vary the terms of a written contract.

The acceptance of the defendant was an absolute promise to pay ; it is not competent for him to contradict the written contract by proof of an oral agreement that he accepted the drafts upon the condition that he should not be called upon to pay them according to their tenor. *Wright v. Morse*, 9 Gray, 337 ; *Allen v. Furbish*, 4 id. 504, and cases cited.

According to the terms of the report, there must be

*Judgment on the verdict for the plaintiff.*

## COMMONWEALTH V. BARRY.

(116 Massachusetts, 1.)

*Larceny and embezzlement by officers of National banks — Jurisdiction.*

State courts have jurisdiction over larcenies committed upon the property of National banks, by their officers. (*See note*, p. 610.)

The fact that an officer of a National bank, who has stolen its property, is subject to punishment for embezzlement under the National Banking Act does not relieve him from liability to punishment for the same act as a larceny at common law, or under the statutes of a State.

Where the property of a National bank is intrusted to the teller during the day while engaged in transacting its business but at night is placed in a safe which he cannot rightfully open, if he abstracts the property from the safe at night and converts it to his own use, his offense is larceny and not embezzlement.

**I**NDICTMENT under the General Statutes, chapter 161, section 43, charging that the defendant on October 21, 1871, with felonious intent, did buy and receive and aid in concealing certain property belonging to the National Mechanics' Bank, knowing the same to have been stolen.

At the trial in the Superior Court, before ROCKWELL, J., the defendant pleaded in bar to the jurisdiction that the offense set forth in the indictment was only cognizable by the Circuit Court of the United States for the District of Massachusetts; but the presiding judge disallowed and overruled the plea.

William S. Hine was called as a witness, and testified as follows: "I was the book-keeper and teller of the National Mahawie Bank of Great Barrington, Massachusetts, from February 1, 1869, to October 21, 1871, inclusive; as such teller I had the control of the combination locks of three of the four doors of the vault and safe (there being two doors on the vault and two on the safe), the cashier had the other combination; without a knowledge of the combinations of these four locks, access could not be obtained to the inner safe, in which the money of the bank was kept; the cashier did not have the combinations of the three locks which I had, nor I of the one which he had, which was that of the outside door of the inner safe, being the third door of the vault. At noon, October 21, 1871, the cashier left the bank to go to dinner, putting

the money into the vault, and locked the outside door of the vault, leaving the outside door of the inner safe standing open; I opened the outer door of the vault, the combination of which lock I had, and finding the outside door of the inner safe open, I took a screw driver and removed the brass box which held the number of the combination on that door, and in that way obtained a knowledge of the combination of that lock, which enabled me to unlock that door when locked while the combination was in use. There being an error in the books of the bank, the cashier and I remained in the bank that evening till half-past eight o'clock, at which time I placed the money in the safe and fastened the doors; the cashier and I then left the bank together, he going toward his home, and I then returned to the bank, unlocked the door, entered the bank, lighted a candle, and unlocked the doors of the safe and vault, using the same combination which existed at noon-time, and removed all the funds and money of the bank, wrapped them up in a paper and left the bank, locking all the doors, and proceeded with the money to my boarding-house. On Friday, October 20, 1871, I received notice from the cashier that I would be discharged from the employ of the bank on account of my irregular habits; on the evening of that day, at about nine o'clock, having made up my mind to take the funds of the bank, I met the defendant Barry in the streets of Great Barrington, and asked him to drive me to Pittsfield the next afternoon, as I wanted to take the nine o'clock P. M. train from Pittsfield to Albany, and agreed to give him \$50 if he would get me there in time to do so; he seemed astonished at the offer; I told him if I chose I could take the funds of the bank, and I thought of doing so the next day; he asked me if I meant business, and I said yes; we then proceeded down the railroad track some distance, and I then disclosed to him my plans; this was the commencement of the defendant's knowing or having any thing to do in the transaction; after I had taken the funds of the bank to my boarding-house, and placed them in a satchel, I proceeded with the money from my boarding-house to Humphrey's Bridge, the place agreed upon for meeting Barry; I found Barry there without a conveyance of any kind, and we then concluded to walk to Van Deusenville, where I was to take the cars, and did so; I took from the satchel three packages of money, amounting in all to about \$1,700, and delivered them to the defendant Barry, and took the train for Pittsfield; that was the last I saw of Barry."

It was proved that Hine at January term, 1872, of the Supreme Court in Berkshire, had pleaded guilty to an indictment for larceny of \$24,894 of the moneys of the said National Mahawie Bank from the building of said bank, and been sentenced thereon to the house of correction for two years.

The government proved the organization of the National Mahawie Bank, under the laws of the United States, and in accordance with the provisions of the acts of Congress in relation to the organization of National banks contained in the U. S. Statutes 1864, chapter 106.

The defendant asked the judge to rule that upon this evidence his offense was not within the jurisdiction of the court. The judge declined so to rule; the jury returned a verdict of guilty and the defendant alleged exceptions.

*J. M. Barber* (*E. M. Wood* with him), for defendant. 1. The offense of the defendant was only cognizable by the courts of the United States. It appeared in evidence that Hine was the teller of the National Mahawie Bank, which was organized under the United States Statutes of 1864, chapter 106, and that while such teller, he abstracted, and took from the vault of the bank a large sum of money belonging to the bank, and converted it to his own use. This was an offense under section 55 of that act, and was punishable as a misdemeanor. There was evidence tending to show that the defendant aided and abetted Hine in taking said money and converting it to his own use, advising with him in regard to taking the money, and assisting him in carrying the same to Van Deusenville, and receiving and concealing a portion of the same. By so doing he committed an offense under the United States Statutes of 1869, chapter 145. The offense was only cognizable by the courts of the United States.

The United States Statutes of 1789, chapter 20, section 11, provides that the Circuit Courts of the United States "shall have exclusive cognizance of all crimes and offenses cognizable under the authority of the United States, except where this act otherwise provides, or the laws of the United States shall otherwise direct." No law of the United States gives to the State courts cognizance of offenses under the United States Statute of 1864, chapter 106, or the United States Statutes of 1869, chapter 145. It therefore

follows that the State courts have no jurisdiction of the offense committed by the defendant. *Commonwealth v. Felton*, 101 Mass. 204 (*ante*, p. 573); *Prigg's Case*, 16 Pet. 539, 617; *Houston v. Moore*, 5 Wheat. 1, 27; 1 Kent's Com. (12th ed.) 399; *Commonwealth v. Fuller*, 8 Metc. 313, 319; *Commonwealth v. Tenney*, 97 Mass. 50 (*ante*, p. 568).

2. The offense of Hine, as stated in his own testimony, was embezzlement, and not larceny. He was the teller of the bank; that is, the officer who receives and pays out its money; and, as he testifies, that upon that evening at half-past eight o'clock, he himself placed the moneys of the bank in the safe, inside the vault, and fastened the doors; as teller of the bank he could lawfully take its moneys from the safe and pay them to third persons, and his office of teller continued in the night time as well as during the day. This case is distinguishable from *Commonwealth v. Davis*, 104 Mass. 548, by the fact that in the latter case the defendant had no right to remove the goods, or to sell them, or had even the bare custody of them, being simply a clerk and packer in the employ of the owner of the goods.

3. It is entirely immaterial whether the crime of Hine was embezzlement or larceny. Whichever it was, all the acts which he did from the time when he took the money out of the vault, until he and the defendant parted at Van Deusenville, constituted an offense under the U. S. Stat. of 1864, chapter 106, section 55, and in doing all these acts he was, according to the testimony, aided and abetted by the defendant, who, in doing all that he did, committed an offense under the U. S. Statute of 1869, chapter 145, which offense was cognizable by the courts of the United States and only there.

*C. R. Train*, Attorney-General, for the Commonwealth.

WELLS, J. The only question argued before us by the defendant is that of jurisdiction. It is contended that when an offense is punishable both by the laws of a State and by those of the United States, the jurisdiction of the courts of the latter excludes that of the State courts, unless otherwise provided by the laws of the United States.

If we assume that position to be correct, it does not meet this case. The offense charged in the indictment upon which the



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defendant was found guilty, is that of receiving and aiding in the concealment of stolen property, under the General Statutes, chapter 161, section 43. The count recites the previous larceny of the property, consisting of money, from the National Mahawie Bank, by William S. Hine. Both this and the principal offense of Hine, as set forth, are independent of any trust, and of any relation of either to the bank as officer, clerk or agent. But such relation and breach of trust are essential elements in the offense, punishable under the laws of the United States. The U. S. Statutes of 1864, chapter 106, section 55, provides: "That every president, director, cashier, teller, clerk, or agent of any association, who shall embezzle, abstract or willfully misapply any of the moneys, funds or credits of the association" shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by imprisonment not less than five nor more than ten years. The two offenses are essentially different. The statute of the United States does not purport to punish larceny as such. The obvious inference is that Congress did not intend to interfere with the jurisdiction of State laws and State courts over offenses of that class against the property of National banks.

The defendant contends that, as it appeared in evidence that Hine was in fact teller of the bank, and was enabled through that position to secure the means by which to "abstract" the funds from its vault, his offense comes within the terms of the statute of the United States, and is punishable exclusively under it; and therefore that the accessorial offense of Barry cannot be punished at all. *Commonwealth v. Felton*, 101 Mass. 204 (*ante*, p. 573).

In our opinion, neither branch of this proposition can be maintained. In the first place, if the fact that Hine was teller of the bank subjects him to the punishment imposed for his breach of trust in that capacity, under the statute of the United States, it does not relieve him from his liability to punishment for the larceny at common law or under the statutes of the State. There is no identity in the character of the two offenses, although the same evidence may be relied upon to sustain the proof of each. An acquittal or conviction of either would be no bar to a prosecution for the other. *Commonwealth v. Tenney*, 97 Mass. 50 (*ante*, p. 568); *Commonwealth v. Hogan*, 97 Mass. 122; *Commonwealth v. Harrison*, 11 Gray, 308; *Commonwealth v. Shea*, 14 id. 386; *Commonwealth v. Carpenter*, 100 Mass. 204; *Morey v. Commonwealth*, 108 id. 433.

Exclusive jurisdiction of the one does not exclude jurisdiction of the other.

Upon the facts stated it is clear that the offense of Hine was larceny and not embezzlement. Although as teller he was intrusted with funds of the bank while engaged in transacting its business, at night they were withdrawn from his possession and placed in such custody that he could not lawfully resume possession until the return of business hours and the concurrence of the cashier authorized him to do so. That custody was possession by the bank; and his wrongful violation of it made the taking of the funds larceny. *Commonwealth v. Berry*, 99 Mass. 428; *Commonwealth v. Davis*, 104 id. 548.

In the second place the offense of receiving stolen property is a substantive crime in itself, and not merely accessory to the principal offense of larceny. In this respect the case is clearly distinguishable from that of *Commonwealth v. Felton*, *supra*.

*Exceptions overruled.*

In *State v. Tuller*, *ante*, p. 375, the Supreme Court of Connecticut held that while a State court has no jurisdiction of the offense of embezzlement by an officer of a National bank of the property of the bank, it has jurisdiction of the larceny or purloining by such officer of the property of others left with the bank for safe-keeping. This conclusion was based upon the argument that the exclusive Federal jurisdiction was limited to offenses arising out of the internal working of such banks—to offenses arising out of the relation between the officers, clerks and agents of the bank, and the bank itself; but that as to the offenses arising out of the business relations between the bank or its officers and agents and its customers the state court had jurisdiction. Thus the court said: "It is theft by our law to steal from a National bank; it is burglary to break into one for the purpose of stealing; and it is cheating to obtain money from one by false pretenses. As a corporate being, located in the State, its property and interests and business are protected by state laws and subject to state legislation, and so it is competent for the legislature to protect its customers, the citizens of the State, in their *business dealings* with it, whatever they may be, whether constituting the relation of borrower and lender or of special or general depositor and bailee; and they may be controlled and protected by penal en-

actments, without interference with the laws of Congress."

In *Commonwealth v. Tenney*, *ante*, p. 568, the Supreme Judicial Court of Massachusetts held that a State court had jurisdiction of an indictment against an officer of a National bank for fraudulently converting to his own use the property of an individual deposited in the bank, under a state statute making such fraudulent conversion "larceny." This was on the ground that the offense charged had not been made punishable by act of Congress, as the 55th section of the National Banking Act only applied to embezzlement of the property of National banks.

Again, in *Commonwealth v. Felton*, *ante*, p. 573, the same court held that a State court had no jurisdiction of the crime of embezzlement by an officer of a National bank of the funds of the bank since such offense is exactly covered by the act of Congress, and also that as Congress had made such offense a misdemeanor, only an accessory could not be punished under a state statute making the offense a felony.

The foregoing case of *Commonwealth v. Barry* is in accordance with these decisions, holding that while a State court has not jurisdiction of the offense of embezzlement of the property of the bank by an officer thereof, it has jurisdiction of the offense of larceny of the property of the bank by

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such officer. The case turned on the distinction between "embezzlement" and "larceny." Had the teller appropriated to his own use the property of the bank while it was intrusted to him during the day, the offense would have been *embezzlement*, and not punishable in the State courts; but having purloined such property after it had been withdrawn from his possession and

custody, and placed beyond his lawful reach, his offense was *larceny*.

Whether the provision of the Revised Statutes has wrought any change on this subject seems not to have been decided. See the section of the Revised Statutes quoted in full to note to *United States v. Taintor*, *ante*, p. 256. As to intent, see that case; also *Matter of Van Campen*, *ante*, p. 185.—*REP.*

## TAPLEY V. MARTIN.

(116 Massachusetts, 275.)

*Certificate of organization as evidence — Liabilities of sureties on cashier's bond.*

Under the National Banking Act, a copy of the certificate of organization of a United States National bank, which is certified by the Comptroller of the Currency and authenticated by his seal of office, is competent evidence in a State court.\*

A surety on the bond of the cashier of a National bank is not discharged by the fact that the cashier had, before the bond was given, committed frauds upon the bank, if such frauds were unknown to the officers of the bank, although they were guilty of gross negligence in not discovering them. (*See note*, p. 614.)

In an action by a surety on the bond of an officer of a bank to recover an amount paid on the bond without suit, against one who had agreed to save him harmless from all loss which he might suffer as surety, the court instructed the jury that if the plaintiff made the payment without the assent of the defendant, he must show that he was legally liable, but if he procured the assent in good faith, he could recover. *Held*, that the defendant had no ground of exception.

CONTRACT on an agreement made by the defendant to indemnify the plaintiff for any loss or damage sustained by him as surety on the bond of James D. Martin, as cashier of the Hide and Leather National Bank, Boston. At the trial, before WELLS, J., the jury returned a verdict for the plaintiff, and the defendant alleged exceptions. The nature of the case appears in the opinion.

A. A. Ranney, as *amicus curiæ*, in support of the exceptions.

G. O. Shattuck & O. W. Holmes, Jr., for plaintiff.

\* See *Thatcher v. West River National Bank*, *post*.

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MORTON, J. [After deciding that a party does not, by removing into another State after suit brought, entitle himself to remove the suit into the United States Circuit Court.]

2. The copy of the certificate of organization of the Hide and Leather National Bank, certified by the Comptroller of the Currency, was properly admitted in evidence. The act of Congress provides that copies of such certificates, duly certified by the Comptroller, and authenticated by his seal of office, shall be evidence "in all courts and places within the United States." U. S. Stat. 1864, ch. 106, § 6. And, independently of this provision, such certificates, when filed, are a part of the public records, and may be proved by duly authenticated copies. *Stetson v. Gulliver*, 2 Cush. 494; *Oakes v. Hill*, 14 Pick. 442.

3. The court ruled "that there was no evidence in the case, as tendered, which showed such knowledge by the officers of the bank of frauds or defalcations by Martin before the date of his bond as cashier, that the failure to communicate the information to the sureties would discharge them from the obligation of their bonds;" and the defendant excepted.

To understand this question it is necessary to state the facts bearing upon it. James D. Martin, a son of the defendant, was appointed cashier of the Hide and Leather National Bank, in January, 1867. The plaintiff, at the request of the defendant, became one of his sureties, and the defendant gave the bond in suit to indemnify him against any loss by reason of his becoming surety. Martin had been a book-keeper in the bank before he was appointed cashier, and the defendant introduced evidence tending to show that while he was book-keeper he was guilty of frauds and defalcations similar to those of which he was guilty after he became cashier, and for which the plaintiff, as his surety, was liable. She also introduced evidence tending to show that while Martin was book-keeper, the attention of the directors was called to the fact that there were errors and inaccuracies in his books. But there was no evidence that the officers of the bank had knowledge that Martin, while book-keeper, was guilty of frauds or defalcations.

The defendant contended at the trial that the officers were guilty of gross negligence in not examining the books, and that the sureties were thereby discharged. But the court ruled, that unless the defendant proved actual knowledge by the officers of previous fraud, the sureties would not be discharged; that negligence in failing to

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examine, however gross, would not discharge the sureties, and, as before stated, that there was no evidence of such knowledge by the officers of the bank.

We are of opinion that these rulings were sufficiently favorable to the defendant.

Upon examining the evidence reported in the bill of exceptions, it is clear that there is no evidence which would justify the jury in finding that the officers of the bank had actual knowledge of Martin's frauds while he was book-keeper. We are not, therefore, called upon to decide whether, if they had such knowledge and failed to communicate it to the sureties on Martin's bond as cashier, the bond would be thereby avoided as to the sureties. The only question is, whether their negligence in failing to examine the books discharges the obligations of the sureties. We can see no principle upon which it can be held to have this effect. The object of the bond is to guarantee to the bank the faithful performance by the cashier of his duties. His duties and obligations are not affected by the negligence of the other officers or agents of the bank, and such negligence does not discharge his sureties. In *Amherst Bank v. Root*, 2 Metc. 522, which was similar to the case at bar, Chief Justice SHAW says: "The idea that the cashier is excused by the act of negligence of the directors arises from considering the board of directors as the corporation, and then applying a very equitable principle, that one ought not to recover of a surety damages caused by himself. We think the principle does not apply." In the case at bar the plaintiff was not induced to sign the bond by any fraud of the directors, and the court correctly ruled that he would not be released from his obligations as surety by their alleged negligence in failing to examine the books and affairs of the bank. *Minor v. Mechanics' Bank of Alexandria*, 1 Pet. 46; *United States v. Kirkpatrick*, 9 Wheat. 720; *Franklin Bank v. Stevens*, 39 Me. 532; *Farmington v. Stanley*, 60 id. 472.

4. It appeared that the plaintiff paid the amount of his bond to the bank without a suit; and the court instructed the jury that if he made this payment without the assent of the defendant, he must show that he was legally liable; but if he procured her assent, and made the payment in good faith upon that assent, she could not put the plaintiff to proof that he was legally liable; to which the defendant excepted. This ruling was correct, accompanied, as it was, with the further instruction, that good faith, in the sense

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intended in the ruling, required that the plaintiff should inform the defendant of all facts known to himself bearing upon his liability. The plaintiff had only a nominal interest in the question of his liability on the bond. The defendant was the real party interested in this question. It was her right and duty to judge whether any defense should be made to the claim of the bank. After she had requested him to pay, or assented to his paying, he could not properly defend against the claim. If he did so, it would be at his own risk and expense, and he could not recover of the defendant any of the expenses of such unauthorized defense; he had the right to act upon her assent, and pay the claim without a suit; such payment was made at her request, and she is liable for the amount paid, and cannot defend upon the ground that there was a defense to the claim of the bank which she neglected to make before the payment.

We have considered all the questions raised by this bill of exceptions, although some of them have become immaterial by the special finding of the jury in the case. In answer to a special question submitted to them, they have found that the plaintiff made the payment to the bank with the assent of the defendant and in good faith. It was within the discretion of the court to submit this question to them, and their finding upon it is conclusive, and renders immaterial all questions as to the liability of the plaintiff on his bond.

*Exceptions overruled.*

NOTE.—See *Graves v. The Lebanon National Bank*, ante, p.492, wherein is considered what negligence on the part of directors of a bank will discharge the sureties on a cashier's bond. It is to be observed, however, that that case turned on the fact that the directors held out the cashier as a trustworthy, honest official, and presumably thereby induced the sureties to become such, when in fact the cashier was a defaulter and the directors should and would with reasonable diligence have known it.

It may be generally stated that the law requires that perfect good faith should be adhered to between obligees and sureties, and that whenever there is any misrepresentation or even concealment by the obligee from the surety as to any material fact which, had he been aware of, he might not have entered into the contract of suretyship, he will be discharged. *Rees v. Berrington*, 2 White & Tudor's Lead. Cas. 1871.

In *Atlas Bank v. Brownell*, 9 R. I. 168; S.C., 11 Am. Rep. 231, it was held in a suit on a cashier's bond, that it was no defense; that the directors had been negligent in examining his accounts. There the alleged negligence occurred after the bond was executed. The defendants offered further to prove that prior to the execution of the bond the cashier had lost money by gambling; that the directors knew it and in consequence concluded to increase the bond, that thereafter the defendants became surety on the bond, and that the directors did not communicate to the defendants the fact of the gambling. The court held that the evidence was properly excluded on the ground that the information withheld related, not to the business which was the subject of the suretyship, and not to the conduct of the cashier as cashier, but to his general character.

The court said, "Ordinarily, the concealment, to make void a contract, must amount to the suppression of

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facts which one party is bound in conscience and duty to disclose to the other, and in respect to which he cannot innocently be silent." Story's Eq. Jur., § 204. But Judge STORY lays down further, that, in the case of a surety, concealment of facts which go to increase his risk amounts to a fraud on the surety; and the omission to disclose is equivalent to an affirmation that the facts do not exist. Story's Eq. Jur., §§ 214, 215, 324, 383. But we think this doctrine of the text-books is stated much more strongly than the decided cases warrant. In *Railton v. Matthews*, 10 Cl. & F. 934, plaintiffs appointed an agent and took bond, they knowing the agent had misapplied moneys in a former agency, and not communicating it. It was contended that, to discharge the surety, the concealment must be willful, and with a view to the advantage of the obligee. Lord CAMPBELL, in delivering judgment in the House of Lords, said it would do to make the liability depend on the *motive* of concealment; it was enough that the plaintiffs knew facts material for the surety to know and did not disclose them; the motive might have been kindness to the agent; the effect would be the same; the fact that he was in arrear, and had been guilty of fraudulent conduct, and was a defaulter, were facts material for the surety to know. In a later case (*Hamilton v. Watson*, 12 Cl. & F. 109), Lord CAMPBELL, in delivering the judgment of the House of Lords, said that it would put an end to the Scotch practice of giving security for cash loans, if it was necessary for the creditor to disclose every thing material for the surety to know; and laid down this as the criterion whether the disclosure should be voluntarily made by the creditor; 'whether there is any thing that might not naturally be expected to take place in the transaction, *i. e.*, whether there be a contract between the debtor and creditor, to the effect that his position shall be different from that which the surety might naturally expect,' but that if there be nothing of this sort, then the surety, if he would protect himself, must inquire.'

"In *North Brit. Ins. Co. v. Lloyd*, 10 Exch. 523, B, who was surety for a loan upon stock for A, applied to the plaintiffs, before the loan became due, to be released on procuring other surety, and plaintiffs consented. A applied to the defendant to become surety, and represented that his stock would otherwise be sacrificed, but did not communicate the fact that the former surety was to be released. The

defendant testified, that if he had known that, he would not have become surety; but, on cross-examination, admitted "that he relied on the solvency of Sir T. Branche," the principal. In the course of a desultory running argument between the court and counsel, the judges criticised the decision in *Railton v. Matthews*, as going too far, and say that the point decided by Lords CAMPBELL and COTTENHAM in that case was, in effect, that it was not necessary to render a concealment fraudulent, that it should be made with a view to the advantage of the person concealing. The court held that the non-disclosure of the change of security would not vitiate the guaranty, unless fraudulently kept back, and that there was no ground in this case to impute fraud; that the former surety might well wish to be released for other reasons than doubt of Sir T. Branche's solvency.

"In the *Franklin Bank v. Cooper*, 36 Me. 179, the directors knew of the cashier's default, and took bond from him to account for all property heretofore intrusted to him, etc. Held, that the surety had a right to presume that the transaction was in the ordinary course of business; that the bank was bound to communicate facts increasing the risks, and which would have an important influence on the decision of the surety.

"In the case of *Bank of the United States v. Etting*, 11 Wheat. 59, the United States Supreme Court, being equally divided in opinion, the question was not decided.

"We think that it is going too far to say that the creditor is, in all cases, and without being inquired of, bound to communicate every thing that it is important for the surety to know, and that would increase his risk. Under such a rule no one would ever know when he could rely on a bond, and it would lead to a good deal of litigation.

"We think the safe rule is that, to avoid the bond, there must be, on the part of the creditor, a fraudulent concealment, or withholding of something material for the surety to know. Would the fact which the defendant offered to prove, if proved, have amounted to a fraudulent concealment or withholding? It is not alleged here that the directors withheld any information inquired for, or said or did any thing which could have a tendency to mislead the surety, or made any, the least, effort to induce the defendant to become surety. If there had been an actual default, and an attempt by the directors to cover it up, or reimburse themselves at the expense of the surety, the case would be different.

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"Moreover, the cases which we have referred to are cases in which the information withheld or not disclosed, related in some way to the business which was the subject of the suretyship. In this case, the undisclosed information related, not to the business which was the subject of the suretyship, and not to the conduct of the cashier, as cashier, but to his general character. It did not follow that because he gambled he would fail in his duty as cashier, and the exceptions do not show that his actual delinquency had any connection with his gambling. The directors may have deemed it advisable to demand an increase of his bond because of his gambling; and so they might have deemed if they had learned he was keeping a fast horse, or speculating in the stocks. But would it have been their duty, unless inquired of, to impart their knowledge to the sureties? We think not, in the absence of a more confidential relation than that which is implied in the mere giving and accepting of the surety-bond. If, when there is no such confidential relation, the sureties wish to have the obligees affected with a duty to give such information, they should inquire for it. Otherwise, it may be supposed that they are content with what they themselves know, or with inquiries which they have made elsewhere."

In *Owen v. Homan*, 8 Mac. & G. 378, the creditor or obligee was held to be bound to make a full, fair and honest communication to the surety of all circumstances connected with the transaction to which the suretyship is to be applied, which are calculated to influence the discretion of the surety in entering into the required obligation. See that case on appeal, 4 H. L. Cas. 997. Matters unconnected with the transaction of the suretyship need not be disclosed to the surety unless he inquire concerning them. *Wythes v. Labenchere*, 3 De G. & J. 593.

Mere negligence of a bank in detecting dishonest practices of a cashier will not discharge his sureties. There must be such negligence as in law amounts to a fraud on the sureties to accomplish that result.

The distinction between mere negligence and fraud on the part of obligees as to the liability of sureties was clearly stated in *United States v. Kirkpatrick*, 9 Wheat. 720. That was an action on an official bond taken by the government. The defense was neglect on the part of the collecting officer of the government to sue within the time prescribed by law. The court, STORY, J., delivering the opinion, said: "It is

admitted that mere laches, unaccompanied with fraud, forms no discharge of a contract of this nature between private individuals; such is the clear result of the authorities." The same distinction was applied to cashier's bonds in *State Bank v. Chetwood*, 3 Halst. 1, and in *Taylor v. Bank of Kentucky*, 2 J. J. Marsh. 565; *Morris Canal Co. v. Van Vorst*, 1 Zab. 100.

So, in *Minor v. Bank of Alexandria*, 1 Pet. 61, it was held that a usage of the board of directors to permit the cashier to misapply the funds of the bank would not exonerate his sureties. STORY, J., who delivered the opinion of the court, said: "The question then comes to this, whether any act or vote of the board of directors, in violation of their own duties and in fraud of the rights and interests of the stockholders of the bank, could amount to a justification of the cashier, who was a *particeps criminis*. We are of opinion that it could not. However broad and general the powers of the direction may be for the government and management of the concerns of the bank, by the general language of the charter and by-laws, those powers are not unlimited, but must receive a rational exposition. It cannot be pretended that the board could, by a vote, authorize the cashier to plunder the funds of the bank, or to cheat the stockholders of their interest therein. No vote could authorize the directors to divide among themselves the capital stock, or justify the officers of the bank in an avowed embezzlement of its funds. The cases put are strong, but they demonstrate the principle only in a more forcible manner. Every act of fraud, every known departure from duty by the board in connivance with the cashier, for the plain purpose of sacrificing the interests of the stockholders, though less responsible in morals or less pernicious in its effects than the cases supposed, would still be an excess of power, from its illegality, and, as such, void as an authority to protect the cashier in his wrongful compliance. Now, the very form of these pleas sets up the wrong and connivance cannot for a moment be admitted as an excuse for the misapplication of the funds of the bank by the cashier."

The same rule was held in *Amherst Bank v. Root*, 2 Mete. 522; *Taylor v. Bank of Kentucky*, 2 J. J. Marsh. 565, and in *Sparks v. Farmers' Bank*, 9 Am. Law Reg. 365.

So in *Atlantic and Pacific Telegraph Co. v. Barnes*, 64 N.Y. 385; S.C., 21 Am. Rep. 621, in an action upon a bond given by an employee to his employer,



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conditioned that the former would faithfully account for all moneys and property coming to his hands, it was held that the sureties were not discharged from subsequent liability by an omission of the employer to notify them of a default by the employee which was known to the employer and a continuance of the employment after such default where it did not appear that such default arose through the fraud or dishonesty of the employee. The court expressed the opinion that had the default arisen through the dishonesty of the servant, a withholding of the fact from the sureties and the continuance of him in the service would have discharged the sureties.

This was held in *Phillips v. Foxgill*, L. R., 7 Q.B. 666, where on a continuing guaranty of the honesty of a servant it was held if the master discovered that the servant has been guilty of dishonesty in the course of the service and instead of dismissing the servant he chooses to continue him in his employ without the knowledge and consent of the sureties, he cannot afterward have recourse to the surety to make good any loss arising from the dishonesty of the servant during the subsequent service. The same principle was held in *Sanderson v. Aston*, L. R., 8 Exch. 73, and in *Burgess v. Eve*, L. R., 13 Eq. 450.

In *Black v. Ottoman Bank*, 15 Moore's P. C. 472; S. C., 8 Jur. (N. S.) 801, the surety on the bond of a bank cashier was held not to be discharged by a failure of the bank to use diligence in guarding against the cashier's dishonesty — that mere negligence would not absolve the surety; and in *Dawson v. Lawes*, Kay, 280; S. C., 23 L. J. Chan. 434, it was held that to discharge a surety for the due performance of duties, there must be on the part of the obligee an act of connivance or gross negligence, amounting to willful shutting of the eyes to fraud or something approximating it. There must be something amounting to fraud to enable a surety to say that he is released from his contract on account of misrepresentations or concealments. *Pledge v. Buss*, Johns. (Eng.) 663.

A concealment by a creditor that at the time of the contract the principal debtor was already indebted to the creditor in a considerable sum, of which fact the surety was ignorant, has been held evidence to go to the jury of such fraud on the surety as would discharge him. *Lee v. Jones*, 14 C. B. (N. S.) 386. See, also, *Hamilton v. Watson*, 12 C. & F. 258; *Smith v. Bank of Scotland*, 1 Dow. 272; *Padcock v. Bishop*, 3 B. & C. 605; *Peel v. Tatlock*,

1 Bos. & P. 419; *Squire v. Whitten*, 1 H. L. Cas. 333; and the same rule would apply to sureties on cashiers' bonds as to concealments by the bank.

In *Lee v. Jones*, *supra*, *affd.* on appeal, 17 C. B. (N. S.) 482, P. had been employed by the plaintiffs in the sale of coal for them on commission, for which he at the end of each month gave them his acceptance, and by the terms of his agreement he was to hand over to them within six days all moneys he received from customers. P. having fallen in arrears to the extent of 1,272*l.*, the plaintiffs required him to find security to the amount of 300*l.*, and at his request the defendant consented to guarantee 100*l.* The agreement of guaranty recited the terms of dealing between the plaintiffs and P.; but the fact that P. was already indebted to the plaintiffs in the large sum above mentioned was concealed from the sureties. In an action against the defendant upon the agreement, he pleaded that he was induced to make it by the fraudulent concealment by the plaintiffs of a material fact: Held, that the non-communication by the plaintiffs to the defendant of the fact that P. was at the time indebted to them was evidence for the jury in support of the plea.

*Farmington v. Stanley*, 60 Me. 472, cited in the principal case, held that the failure of selectmen to examine the accounts of a town treasurer as by statute directed or to detect an error in his accounts would not discharge a surety on his bond. This decision was put upon the ground that the selectmen were only agents of the town with limited powers; that they had no authority directly to discharge the sureties on the treasurer's bond and could not therefore do it indirectly.

In the *Board of Supervisors v. Otis*, 62 N. Y. 88, it was held that neither negligence nor malfeasance of a board of supervisors in their transactions with a county treasurer, would discharge the sureties on the bond of such treasurer.

A cashier's bond (and the bonds of other bank officers are governed by the same rules) covers all duties annexed to the office from time to time, either by law or by the directors, and the sureties are liable for any default in such duties.

*Minor v. Bank of Alexandria*, 1 Pet. 46; *Morris Canal Co. v. Van Vorst*, 1 Zab. 100.

Such bonds are a surety not only for honesty, but for reasonable skill and diligence, so that if a cashier violates his duties through negligence or want of capacity his sureties are liable. *Minor v. Bank of Alexandria*, 1 Pet. 64; *State Bank v. Chetwood*, 3 Halst. 1; *American*

## Upton v. National Bank of South Reading.

*Bank v. Adams*, 12 Pick. 303; *Union Bank v. Forrest*, 3 Cranch, 218; *Commercial Bank v. Ten Eyck*, 48 N. Y. 305.

The failure of a cashier to be sworn when that is required does not vitiate his bond but is rather a breach of it. *State Bank v. Chetwood*, 3 Halst. 1. But it is no forfeiture of a bond conditioned for the faithful service of a cashier that a loss has occurred by mere accident or mistake. *Morris Canal Co. v. Van Vorst*, 1 Zab. 100.

So it is a breach of a cashier's bond for him to change, without authority, the securities of the bank. *Barrington v. Bank of Washington*, 14 Serg. & R. 405.

It is a violation of duty for a cashier

to allow an overdraft. *Bank of St. Mary v. Calder*, 3 Strobb. (S. C.) 403; or to certify a check without funds; or that a deposit has been made when in fact none has been made, or to change without authority the securities of the bank. *Barrington v. Bank of Washington*, 14 Serg. & R. (Penn.) 405; to omit some duty required of him by law, as to make a report to the Comptroller of the Currency, whereby the bank has been subjected to a fine or otherwise injured. *Bank of Washington v. Barrington*, 2 Penn. 27. To violate any valid by law, the corporation may prescribe. *Bank of Carlisle v. Hopkins*, 1 Min. (Ky.) 245. And in each case the sureties to the cashier's bond are liable.

## UPTON V. NATIONAL BANK OF SOUTH READING.

(120 Massachusetts, 153.)

*Purchase of real estate by National bank.*

A National bank has authority to purchase such real estate as may be necessary in order to secure a debt due to it, although in excess thereof, if the security of the debt be the real object of the purchase.

A National bank advanced money to a person already indebted to it and took a mortgage on real property to secure both the advance and prior indebtedness. *Held*, that the transaction was valid under the National Banking Law.\*

**B**ILL in equity by the assignee in bankruptcy of one Emerson, to redeem certain lands from a mortgage given by Emerson to John Sawyer, to secure the payment of \$4,500, and assigned by several conveyances to defendant.

The bill alleged that the debt for which the mortgage was given had been all paid, except the sum of \$800 and interest from August, 1873, and that before this suit was begun the plaintiff was ready and offered to pay that sum to the bank.

The defendant's answer admitted these allegations, and alleged that prior to February 21, 1871, the bank had three notes against Emerson amounting to \$911.21, and that by a parol agreement, which was set forth in the answer, between Emerson and the bank,

\* See *Ornn v. Merchants' National Bank*, ante, p. 490; *First National Bank v. Haire*, ante, p. 480; *Fowler v. Scully*, post, and note.

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the latter agreed to lend \$3,000 on the mortgage and to take an assignment of the same to secure said \$3,000 and the said three notes. A general replication was filed, and an issue for the jury was framed and tried before WELLS, J. The judge found that such an agreement was made.

The plaintiff objected to the proof of such an agreement by oral evidence; and asked the judge to rule as follows :

“1. That it was not competent for the defendant to set up and prove such an oral agreement for the purpose for which the evidence was offered under the answer.

“2. That the purchase of the mortgage by the defendant, and the loan made thereon were contrary to the U. S. Statute of 1864, chapter 106, section 28, and the bank could not legally hold the same for the purposes set forth in the answer.” The judge overruled both objections.

It appeared that on February 21, 1871, the mortgage was held by Abbott & Thomas, and that the full amount of the mortgage note, \$4,500, was then due and unpaid. Emerson had been in negotiation with an officer of the defendant bank, who was also an officer of the South Reading Agricultural and Mechanic Association, for an advance of \$3,000, to enable him, with other funds which he expected to procure, to take up his mortgage from Abbott & Thomas. Some objection was suggested as existing, under the act of Congress, against making the transaction directly with the bank; and it was then proposed and arranged that the transaction should be had with the association aforesaid. Emerson thereupon procured an assignment of the mortgage to the association to be made and executed by Abbott & Thomas, and procured Abbott to go with him to the counting-room of the bank and association. The officers of the association declined to take the assignment and to make the advance of \$3,000; whereupon Emerson arranged with the defendant to make the advance, and as a part of the arrangement and as inducement thereto made the oral agreement, above referred to, that the bank should hold said mortgage as security as well for the three notes amounting to \$911.21 already held and due to said bank, as for the \$3,000 then to be advanced.

To carry this arrangement into effect, Thomas not being present, an assignment from the association to the bank was thereupon prepared and executed; the bank advanced \$3,000 to Emerson; he paid over the same sum, with \$1,500 more which he had

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procured elsewhere, to Abbott for Abbott & Thomas, adjusted the interest to that date, which last was indorsed upon the note, and the note, with no payments indorsed except of the interest, together with the mortgage thus assigned, were delivered to the defendant.

Upon the foregoing facts and the finding of the jury upon the issue submitted to them as above stated, the judge ruled and held that the defendant was entitled to hold the mortgage for security of the three notes aforesaid, as well as for the \$3,000 advanced; and ordered a decree to be entered for redemption upon payment of the amount now remaining due of said two sums, and costs for the defendant; and reported the case for the consideration of the full court. If the ruling were wrong, and the bank was entitled to hold only for what remains due of the \$3,000 so advanced, the decree was to be modified accordingly, with costs for the plaintiff, or such other disposition of the case was to be made as should to justice and equity appertain.

*C. P. Judd*, for plaintiff.

*C. W. Eaton & S. K. Hamilton*, for defendant.

DEVENS, J. While it is not lawful for banking associations, established under the United States Statutes of 1864, chapter 106, to purchase, hold and convey real estate except in certain specified cases, among these exceptions are included such real estate "as shall be mortgaged to it in good faith by way of security for debts previously contracted; such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings; such as it shall purchase at sales under judgments, decrees or mortgages held by such association, or shall purchase to secure debts due to said association." Under the latter clause it cannot be deemed that the only authority given to such associations is to purchase only to the exact amount of the debts which may be owing to them, but they are entitled to purchase such real estate as may be necessary in order to secure the debts due to them so long as the security of such debts is the real object of the purchase.

Upon advancing \$3,000 for the purchase of the mortgage which had been assigned to the South Reading Agricultural and Mechanic Association, Emerson himself paid \$1,500 of the debt of \$4,500

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which the mortgage was originally given to secure, and consented that the bank should hold the mortgage to secure the sum of \$3,000 thus advanced, and also three notes amounting to about \$911 then due from him to the bank. The claim that this was a loan of money upon real estate security or a purchase of real estate, is not maintained when it is found as a fact that the inducement to this transaction was the agreement that the mortgage and the real estate upon which it was secured should be held for the antecedent debt due to the bank.

The objection that such an oral agreement could not be put in evidence cannot be maintained. While an indebtedness, other than that for which the mortgage was given, cannot legally be attached to such mortgage, yet it is competent, in answer to a bill in equity to redeem a mortgage, for the defendant to show that it would be inequitable to allow the plaintiff to do so upon payment of the amount apparently due thereon, inasmuch as the defendant had for valuable consideration orally agreed that it should not thus be discharged, but should remain as security for other debts. *Joslyn v. Wyman*, 5 Allen, 62; *Stone v. Lane*, 10 id. 74. Had any question of title arisen between the defendant and a subsequent mortgagee, attaching creditor or *bona fide* purchaser, or even if an action at law had been brought by the defendant to foreclose the mortgage, it must have been decided that the defendant could enforce the mortgage only for that portion of the \$3,000 now actually due. But, if the present bill had been brought by Emerson, he could not have been allowed to obtain a release or discharge of the mortgage from the defendant, to whom it has been assigned, except upon the performance of his oral agreement with the defendant in relation to his antecedent debt. *Joslyn v. Wyman*, *ubi supra*; *Stone v. Lane*, *ubi supra*.

By the assignment in bankruptcy, the assignee has succeeded to all the rights of Emerson, but his rights here are not superior to those of Emerson. He has come into a court of equity to seek its aid in obtaining those rights, and is, therefore, to do what Emerson would have been compelled to do. In order to obtain a decree for the redemption of the mortgage, he must perform the oral agreement that the debt of \$911 due the bank should be paid, as well as pay the balance of the \$3,000 which is now due.

*Decree accordingly.*

## THATCHER V. WEST RIVER NATIONAL BANK.

(19 Michigan, 186.)

*Evidence of incorporation — Certificate of organization — Defense to accommodation note.*

In an action by "The West River National Bank of Jamaica, Vermont," held, that the certificate of the Comptroller of the Currency of the existence of a corporation under the name of "The West River National Bank of Jamaica," described as located in the town of Jamaica, Vermont, was admissible under the general issue for the purpose of proving the plaintiff's corporate existence.

It is no objection to the admission in evidence of the certificate of the organization of a National bank, that the notary before whom it was acknowledged was one of the shareholders of the bank. The Comptroller's certificate of compliance with the act of Congress removes any objection which might otherwise have been made to the evidence on which he acted.\*

A National bank discounted a note made by the defendant for the benefit of the payee and which the payee agreed to take care of at maturity. Held, that the bank could recover on the note although it had when it took the note full notice of the circumstances under which it was given.

**A**CTION on a promissory note made by the defendant Thatcher, payable to the order of "L. N. Sprague, Agt.," and indorsed by him to the plaintiff for value and before maturity.

The declaration described the plaintiff as "The West River National Bank of Jamaica, Vermont." The defendant pleaded the general issue and gave notice that the payee was the agent of the Jamaica Leather Company, and that the note was given without consideration and for the benefit of such company, of which the plaintiff had notice when it discounted the note.

On the trial the plaintiff offered in evidence a document purporting to be a certified copy of the organization certificate of "The West River National Bank of Jamaica," dated August 17, 1865, to which the Comptroller of the Currency certifies that the original was filed and recorded in his office on the 25th day of August, A. D. 1865; and which document contained the following recitals:

"*First.* The name and title of this association shall be The West River National Bank of Jamacia."

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\* See *Tapley v. Martin*, ante, p. 611.

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“*Second.* The said association shall be located and continued in the town of Jamaica, county of Windham and State of Vermont, where its operations of discount and deposit are to be carried on.”

And also a certificate of the Comptroller of the Currency that the plaintiff had complied with the act of Congress.

It appeared by the certificate of acknowledgment of the document first mentioned, that the acknowledgment was taken before Jno. A. Butler, notary public; and by said document it further appeared that J. A. Butler was a subscribing shareholder named therein. To the reading these papers in evidence the defendant objected: (1) That the name of the plaintiff in this suit is “The West River National Bank of Jamaica, Vermont,” and not the name of the institution set forth in said documents; (2) that the certificate of acknowledgment of said first-named document is not sufficient, because it appears upon the face of said first-mentioned document that the notary public taking said acknowledgment is one of the shareholders mentioned in the document; and (3) that it is not alleged in the declaration that the plaintiff is a corporation, nor that it is organized in manner and form as set forth in said documents

The Circuit judge overruled the several objections and allowed the documents to be read in evidence; to which the defendant excepted.

Evidence was offered by the defendant to show the knowledge of the bank of the circumstances under which the defendant signed the note; but the view taken by the court of this point in the defense renders it unnecessary to state in detail this evidence, or the ruling of the court below upon its admissibility and effect.

The defendant requested the court to charge the jury that it was necessary for the plaintiff to prove the indorsement of the note; the judge declined, but charged the jury that the note and indorsement had been read in evidence without objection, and there was no affidavit denying the execution of said indorsement, the defendant was therefore precluded now from disputing it; to which the defendant excepted. The jury found for the plaintiff, and the judgment entered on the verdict is brought into this court by writ of error.

*F. Thatcher*, plaintiff in error, in person.

*W. L. Webber*, for defendant in error.

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CHRISTIANCY, J. There was no error in allowing the plaintiff below (defendant in error) to introduce, for the purpose of proving its corporate existence, the organization certificates, upon which was certified by the Comptroller of the Currency that the original was filed in his office, nor in the admission of the certificates of said Comptroller (of Sept. 21, 1865), that the bank had complied with the provisions of the act of Congress, "To provide a National Currency," etc., of June 3, 1864.

The objection made by the defendant below was, in substance, that by the declaration, the plaintiff claimed to be a corporation by the name of "The West River National Bank of Jamaica, Vermont," and that the certificates did not tend to prove the existence of a corporation by this name, but only of one by the corporate name of "The West River National Bank of Jamaica."

There being no plea in abatement, and the objection arising upon the general issue, the question is whether this is a substantial variance; or rather it is merely a question of identity arising upon the evidence; and no slight variation, which does not go to raise a doubt of the identity, is to be regarded.

The plaintiff is described in the declaration as "The West River National Bank of Jamaica, Vermont," a corporation organized under the act of Congress entitled," etc. (giving the title of the act).

The organization certificate filed with the Comptroller of the Currency, it is true, declares that "the name and title of this association shall be The West River National Bank of Jamaica;" but it also declares that "the said association shall be located and continued in the town of Jamaica, county of Windham, and State of Vermont, where its operations of discount and deposit shall be carried on." And the certificate of the Comptroller, showing a compliance with the provisions of the act of Congress, recites, that "Whereas, by satisfactory evidence presented to the undersigned, it has been made to appear that 'The West River National Bank of Jamaica,' in the county of Windham, in the State of Vermont, has been duly organized," etc.

It is clear enough, therefore, that the bank, the existence of which is proved by the certificate, is "The West River National Bank of Jamaica," in the State of Vermont. And the addition of the word "Vermont" at the end of the proper corporate name in the declaration, rather tends to render the indemnity more specific; and may



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properly be treated as intended only to show in what State the bank was located. And, upon the evidence, we see no reason to doubt the identity of the plaintiff with the bank whose existence is proved by the certificate.

The objection that the organization certificate appears to have been acknowledged before a notary, who by the same document is shown to have been a shareholder in the bank, is one which might have been raised by, or before, the Comptroller, but of which we can take no cognizance here. It was for him to decide upon the sufficiency of the evidence of compliance with the act of Congress, and we cannot review his decision. His certificate of compliance removes any objection which might otherwise have been made to the evidence upon which he acted.

But it is further objected that the evidence of witnesses in the case goes to show that the plaintiff was a bank doing business long prior to the date of these certificates, and therefore that the plaintiff cannot be the same corporation to which the certificates allude. This objection is answered by the 44th section of the act of Congress in question (Statutes at Large, Vol. 13, p. 112), making full provision for banks incorporated under State laws to organize under this act. And we think the fair tendency of the evidence referred to is only to show that this had been such State institution, doing business prior to its organization as a National bank under the act of Congress.

The evidence of the corporate existence of the plaintiff was full and complete, and there was no evidence of an opposite tendency.

The defense relied upon by the defendant below, without going here into unnecessary particulars, was substantially, that the note was given to L. N. Sprague, agent of the Jamaica Leather Company (to whose order it was made payable), without consideration, and merely for the accommodation of said Leather Company, upon the assurance of Sprague that the note would be taken care of and the defendant protected; and that the bank, the indorsee and plaintiff below, received it with a full notice of these facts.

The testimony of the defendant himself, and perhaps some other testimony in the cause, tended to show, that the note was given for the purpose above stated, and without consideration, and with the assurance of Sprague above stated.

But the defendant's own testimony further tended to show that the note was given for the express purpose, and with the full under-

standing that it was to be negotiated to the bank to enable the Leather Company to raise money upon it. It was also clearly shown by other evidence that the bank did discount the note indorsed in blank by Sprague, as agent, and paid the money for it; and there was no evidence of a contrary tendency.

We think it, therefore, wholly immaterial whether the bank had notice, or not, of the circumstances under which, and the purpose for which it was given, and of the other facts relied upon in the defense. Had the directors of the bank, knowing the nature of the previous transactions between defendant and the Leather Company, been present and heard and known the whole arrangement between Sprague and the defendant when the vote was given, the bank would still be entitled to recover. See *Charles v. Marsden*, 1 Taunt. 224; *Smith v. Knox*, 3 Esp. 46; *Thompson v. Shepherd*, 12 Metc. 311; *Brown v. Mott*, 7 Johns. 361; *Lord v. Oceen Bank*, 20 Penn. St. 384; *Grant v. Ellicott*, 7 Wend. 227; *Renwick v. Williams*, 2 Md. 356; *Molson v. Hawley*, 1 Blatchf. 409; *Caruthers v. West*, 11 Q. B. 143.

The want of consideration, and the assurance of Sprague that the note would be taken care of, do not affect the right of the bank as indorsee, though taking it with notice. Mere accommodation paper is generally at least, without consideration, and such assurances, express or implied, are always given or relied upon, when such accommodation paper is given. Such facts might constitute a good defense as against the party for whose accommodation it is given; but to allow them to defeat a recovery by an indorsee who advances money upon it—when that is the purpose for which it is given—would defeat the very purpose for which such paper is made, and render the transaction absurd.

As between the defendant and the indorsee, the defendant took the risk of Sprague's assurances being made good, and his remedy is upon him or the party he represented.

These conclusions render it unnecessary to notice the defendant's requests to charge with reference to the want of consideration, and the question of notice, or the charges given upon these points.

The Circuit Court was right in holding that there was no evidence tending to show that the Leather Company had any interest in the money sought to be recovered in this suit.

A copy of the note with the indorsement, accompanied the declaration, and the note and indorsement were read in evidence without objection, and no evidence was given tending to disprove the

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indorsement. The court was therefore right in refusing to charge that it was necessary to prove the indorsement in any other way.

We see no error in the record, and the judgment must be affirmed, with costs.

The other justices concurred.

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### HOWELL v. THE VILLAGE OF CASSOPOLIS.

(35 Michigan, 471.)

#### *National bank stock — Taxation.*

By general law of a State, shares of stock in National banks were to be taxed in the township where the bank was located, except that where a stockholder resided in another township in the same county, his shares were to be there taxed. A village charter authorized the taxation of "all property, real and personal, within the limits of said village." *Held*, not to authorize a tax on shares of stock in a National bank located in such village, owned by a resident of another township in the same county.

THIS was an action to recover back a tax of one dollar and fifty cents, levied by the village on the National bank stock of the plaintiff, who was a resident of another township in Cass county. The tax was paid under protest to save plaintiff's property from sale on seizure by the village marshal by virtue of process to enforce the payment of such tax. Judgment passed for defendant, and the plaintiff brings the case up for review.

*Howell & Carr*, for plaintiff.

*L. H. Glover*, for defendant.

CAMPBELL, J. The village of Cassopolis levied taxes on the National bank stock of plaintiff, who was a resident of another township in the same county, claiming the right to do so because the bank was located in the village.

The charter of the village authorizes the taxation of "all property, real and personal, within the limits of said village," if not exempt from taxation for county and township purposes.

The general laws of the State provide for the taxation of National bank stock in the township where the bank is located, except that

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where a stockholder resides in another township in the same county, he is taxable in his own township. Laws 1875, p. 185. Before the act of 1875 no shares of non-residents of the place where the bank was located were taxable there, unless against non-residents of the State. C. L., § 974.

The National Banking Law allows the stock in the hands of individuals to be taxed in such manner and place as the State may determine, subject only to two conditions, one of which is, that the rate shall not be greater than that of taxation on other moneyed capital of citizens, and the other, that non-residents of the State holding stock shall be taxed in the city or town where the bank is located. R. S. of U. S., § 5219.

The State legislation is therefore valid, and the only question is, whether the village charter authorizes taxation of stock in the hands of owners, not residing in Cassopolis, but in another town in Cass county.

There is no proper sense in which the stock of a non-resident can be regarded as personal property within the village, unless some statute has so declared. If the bank itself could be taxed, no doubt its personal property would be within the village, because following the domicile. But intangible property, like stock, must always follow the domicile, unless separated from it by positive law.

The only laws of this State which create this separation define its extent, and do not authorize it as against residents of the same county who reside in another township. The act of Congress only requires it in case of non-residents of the State, and as to all State residents, authorize the State to determine its own policy. The statutes are too plain to require construction.

It would be contrary to all sound rules of construction to adopt an interpretation which should change the operation of the general taxing laws in particular localities, unless where there is a plain intent to do so. In the present case the intent is, we think, quite as plainly opposed to any such discrimination, and except for the general laws, stock of non-residents of the village could not be taxed at all.

The judgment below must be reversed, and judgment rendered on the finding in favor of the plaintiff in error for one dollar and fifty cents damages, with costs of both courts.

The other justices concurred.

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Commissioners of Rice County v. Citizens' National Bank of Faribault.

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BOARD OF COUNTY COMMISSIONERS OF RICE COUNTY v. CITIZENS'  
NATIONAL BANK OF FARIBAULT.

(23 Minnesota, 280.)

*National bank — Taxation of banking-house.*

Under a statute requiring shares in National banks to be taxed at their actual value without reduction for real estate, the banking-office and lot, owned and occupied as its place of business by a National bank created, is not liable to assessment and taxation as real estate *eo nomine* against the bank.\*

IN proceedings under the tax law of 1874, to enforce the payment of delinquent taxes in Rice county, the defendant interposed a defense to the tax assessed upon its banking-house in the city of Faribault, and returned as delinquent. In its answer the defendant averred that it was a National bank, organized under the act of Congress; that the real estate in question consisted of land which was purchased, and a building thereon which was erected, with money forming part of defendant's capital stock, for its immediate accommodation in the transaction of its business; that such land and building thereupon became and are a part of the defendant's capital stock, included in the 800 shares into which such capital stock is divided; that all said shares were assessed and taxed, in 1874, to the holders thereof, at their full value in money, without deduction of the value of such real estate therefrom, and all the taxes as assessed on such shares were duly and fully paid; and that the taxes in question, which were assessed in 1874 on the before-mentioned real estate, were assessed on property which had already been duly assessed and taxed at its par value, for the same year, and the taxes on which had been fully paid.

At the trial in the District Court for Rice county, before LORD, J., it was agreed that the facts were as stated in the answer, and the court made a decision, *pro forma*, sustaining the assessment and tax, and, upon defendant's request, certified the case to this court, under Laws of 1874, chapter 1, section 120.

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\* See *City National Bank v. Paducah*, ante, p. 300; *People ex rel. Gallatin National Bank v. Commissioners*, post.

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Commissioners of Rice County v. Citizens' National Bank of Faribault.

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*Gordon E. Cole*, for defendant.

*Geo. P. Wilson*, Attorney-General, and *Geo. N. Baxter*, for plaintiff.

CORNELL, J. Is real property, lawfully owned and used as a place for the transaction of its business by a bank created and existing under the National Banking Law, taxable *eo nomine* against the bank, under Laws 1874, chapter 1, it being conceded that the specific provisions of that statute require the assessment and taxation of all the shares comprising the entire capital stock of the association in the name of the respective shareholders, and at their actual cash value, without any deduction on account of the real property so held by the bank, and in which a portion of its capital is invested? This is the sole question for consideration in this case, and its determination depends upon the character and effect of that statute.

The general policy of the law is to avoid duplicate taxation. No one subject of taxation ought to be required to contribute more than once to the same public burden, while other subjects of taxation, belonging to the same class, are required to contribute but once. In the exposition of any tax law, therefore, a construction leading to any such result should be avoided, unless the cogency of some express provision or unavoidable implication of the statute compels its adoption. Says Judge COOLEY, in his valuable treatise on the law of Taxation: "It is a fundamental maxim in taxation that the same property shall not be subject to a double tax payable by the same party, either directly or indirectly; and when it is once decided that any kind or class of property is liable to be taxed under one provision of the statute, it has been held to follow, as a legal conclusion, that the Legislature could not have intended the same property should be subject to another tax, though there may be general words in the law which would seem to imply that it may be taxed a second time." Cooley on Taxation, 165, and authorities cited in the notes. Especially should this rule obtain in the courts of a State whose Constitution contains an express provision requiring equality and uniformity in the imposition of taxes upon property, according to a cash valuation.

The aggregate capital stock of any corporation is but the representative of its entire property, including the corporate franchise, and the actual cash value of the former depends wholly upon the

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productive character and real cash value of the latter. Intrinsically it possesses no value, and can have none, as separate and distinct from the corporate property it represents; nor is the property, character, or value of such stock increased, or in any way affected, by its division into a given number of shares, unless the proposition be conceded that all the parts are greater or less than the whole. Each share but represents a proportional interest in the corporate property, determined by the exact ratio existing between it and the entire stock, and it possesses a like corresponding value. Sever the connection between the stock and the shares comprising it, on the one hand, and the corporation and its property, on the other, and nothing remains to the former but a mere shadow, to which no real property or commercial value can be imparted by any legislative device whatever. The authorities bearing upon these propositions are very fully collated and cited by Judge COOLEY, in his work on Taxation, pages 164 and 166 inclusive, and the notes appended thereto, although no authority would seem necessary to establish their correctness.

Any legislation, therefore, which requires, for the purpose of taxation, an *ad valorem* assessment of all the shares of stock in a bank, as property, without allowing any deduction on account of the value imparted to them as the representatives of the corporate property and franchise of the bank, and also a like assessment of the corporate property itself under its own proper designation, necessarily provides for double taxation, and in order to give the statute under consideration that effect, it must clearly appear to have been intended by some express provision or necessary implication.

The law under consideration (Laws 1874, ch. 1) contains specific provisions for listing and assessing the property of every incorporated and unincorporated company or association, (§ 28) and of "every bank, whether of issue or deposit (other than a National bank)," and of "every banker, broker, or stock-jobber." § 29. It is not disputed that these specific provisions are so far exclusive in their character that other clauses of the statute, relating generally to the assessment and taxation of real and personal property, can have no application whatever to cases clearly falling within the purview of these sections, unless made applicable by express reference or necessary implication; and, that there might be no doubt as to the legislative intent, it is expressly declared that the tax-

ation of banking corporations "is specifically provided for in this act." § 28. That the phrase, "banking corporations," as here used, is to be understood as including not only every corporate body doing a general banking business, whether under State or National authority, but also all property employed in banking, whether owned by corporations or individuals, is evident from the sections immediately following the one containing this declaration of legislative intent. Section 29 in terms relates to banks created under State authority, to private bankers, and to property employed in banking by both, while the exception from its provisions of National banks shows the latter to have been in the mind of the Legislature while framing the provisions of the statute. Sections 30 to 34, inclusive, refer exclusively and particularly to these institutions, and their duties in respect to the matter of taxation; and no good reason is perceived why these provisions are not to be treated as covering the whole subject of taxation, as affects them, their property, or stockholders. It is made the duty of each National bank to furnish to the assessor a full and correct list of all its stockholders, with the number of shares held by each; and such shares are required to be assessed and taxed at the locality of the bank, upon their value, subject to the sole restriction that such taxation shall not be at a greater rate than is assessed upon other capital or property in the hands of individuals. This clearly indicates that such value is to be ascertained with reference to the actual amount and productive character of the entire corporate property and franchise, represented by the aggregate number of shares, and without any deduction on account of any portion of the capital of the corporation being invested in real estate, or property exempt from taxation. Full and adequate provision is also made for enforcing the payment of every such tax, through the instrumentality of the bank, upon which the duty is imposed to retain the amount out of the dividends due to the respective stockholders.

It is obvious from these provisions that the entire corporate property and franchises of these institutions are subjected to assessment and taxation once in respect to every public burden or matter of taxation. This is manifestly just, as respects both the State and the stockholders of the association, because all the actual property, represented both by the banks and the stockholders as such, is required to contribute its equal and pro-



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portionate share toward the support of the public burden, and no more. If, however, the real property of these associations is liable to assessment and taxation *eo nomine*, in addition to the tax upon the shares, it is quite clear that the banking capital or property represented by the National banks is subject to duplicate taxation to the extent of that so imposed directly upon the real estate. Moreover, it would violate the principle of equality as between the stockholders of different banks; for it is obvious that a shareholder in a bank having a part of its capital invested in real estate would be subjected, directly and indirectly, to a greater amount of tax upon his investment than one holding stock of like value and amount in an institution owning no real property. A construction leading to such results is repugnant to all correct ideas of justice and equality. No such feature of duplicate taxation is found in any of the provisions of this statute relating to the taxation of other banking or corporate property. As respects the State banks, they are taxed only upon the valuation of their taxable property, which is required specifically to be listed for that purpose; their shares of stock are not subject to taxation. As to the companies mentioned in section 28, as amended in 1875 (to cure an evident omission), they are subjected to taxation upon the assessed value of their real and personal property, and also their capital stock, after deducting therefrom indebtedness for current expenses, and the value of such real and personal property. In view of these facts, the legislative intent not to require any assessment of the real property of the National banks *eo nomine*, as against the corporations, seems too plainly manifest to admit of any reasonable doubt. If such an assessment had been intended it would have been specifically provided for as in the case of the State banks under section 29, and the other companies and associations referred to in section 28.

Reference was made, in the argument, to section 1 of the statute, as indicating an intention to require the assessment and taxation of all real estate *eo nomine*. The evident purpose of this section was to declare, in general terms, that all property, both real and personal, within the jurisdiction of the State, unless specially exempted, should be subject to taxation. It does not, however, require the listing and assessment of the property *in specie*. Its language is: "Such property, or the value thereof, shall be entered in the list of taxable property for that purpose, in the manner pre-

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scribed by this act." The mode and manner in which this is to be done is to be sought for, therefore, in the subsequent provisions of the statute. An assessment of corporate property, made by assessing its capital stock, or its shares of stock, upon a valuation fixed with reference to the actual value of the entire corporate property, would not be repugnant to any thing contained in this section.

It is further objected, by respondent, that section 3, article 9, of the Constitution, requires the Legislature to pass laws "taxing all moneys, credits, investments in bonds, stocks, joint-stock companies, or otherwise, and also all real or personal property, according to its true value in money;" that this means the enactment of laws providing for the taxation of these items of property *in specie* or *eo nomine*, and, as it must be presumed that the Legislature intended to conform to this constitutional requirement, the statute in question must receive a corresponding construction. This section must be construed in connection with sections 1 and 4 of the same article, and also in view of the condition of things existing at the time of the adoption of the Constitution. Section 1 declares that "all taxes to be raised in this State shall be as nearly equal as may be, and all property on which taxes are to be levied shall have a cash valuation, and be equalized and uniform throughout the State." Section 4 provides that "laws shall be passed for taxing the notes and bills discounted or purchased, moneys loaned, and all other property, effects, or dues, of every description, of all banks and all bankers, so that all property employed in banking shall always be subject to a taxation equal to that imposed on the property of individuals." The leading and controlling purpose of these provisions was to subject all property, of every kind and nature, within the jurisdiction of the State, except such as is specially authorized to be exempted, to taxation upon a basis of a cash valuation, and to secure, so far as practicable, absolute equality and uniformity in the apportionment of taxes, so that every piece of property should bear its just and proportionate share of the public burden in the exact ratio of its cash value to that of the entire taxable property of the State. To this end section 3 is directed as specially applicable to all property not employed in banking, nor embraced within the purview of section 4.

Though a distinction seems to have been made between the kinds of property mentioned in section 3 and that referred to in section 4, it is obviously not one founded upon the idea of any dis-

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crimination to be exercised between them in the imposition of taxes ; for the like rules of equality and cash valuation are clearly recognized as necessary to be observed as to each. It seems rather to have been the result of an abundance of caution, and an apprehension on the part of the framers of that instrument that the banking capital of the State might possibly, through the oversight or inadvertence of the Legislature, escape its just and equal share of taxation, unless guarded against by some specific provision particularly directing the attention of the law-making power to the subject. To this end section 4 makes it the special duty of the legislature to provide by law for the taxation of all property, of every description, of all banks and of all bankers, "so that all property employed in banking shall always be subject to a taxation equal to that imposed on the property of individuals." The subjection of all such property to equal taxation, upon a like basis with all other property, is the sole and declared purpose of the section. The mode and manner of accomplishing this, so that these rules are observed and the end attained, are matters left entirely to legislative discretion. It may be done, as to State banks, by taxing, upon a cash valuation, and in the name of each, all its taxable property *eo nomine*, either in the aggregate or in detail ; or its entire capital, in case none of it is invested in property exempt from taxation ; or—what would be equivalent thereto—by taxing all its shares of stock against and in the name of the shareholders, upon a like *ad valorem* assessment. Either of these modes would accomplish the result aimed at by the Constitution ; but the imposition of the same tax upon both the capital and the property in which it is invested, or upon either and the shares representing it, would violate the cardinal principle of equality in taxation, which constitutes its distinguishing feature.

As to National banks, they were unknown at the time of the adoption of the Constitution. They have been brought into existence since, under Federal authority, partly to serve the purpose of the National government, as convenient fiscal agents, and partly to promote the same ends, and accomplish the same objects, intended to be subserved by the State banks. In this latter character they have nearly succeeded in replacing all the State institutions, and in absorbing the entire banking capital and business of the country, so that they represent, in fact, the principal property interests which were intended to be affected by section 4, article 9,

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of the Constitution, and to this extent they fall within the spirit, though not perhaps the letter, of its provisions. Inasmuch, however, as the agencies created and established by the Federal government, to assist in the execution of its powers, are exempt from State taxation save as allowed by Congress, the State can only exercise its taxing powers over the National banks, and the capital they employ and represent, in the manner and to the extent permitted by Congressional authority. Under this authority it is permitted to the State to tax the real property of the banks as such, and also all the shares of stock, as personal property belonging to the shareholders, provided the rate of valuation and assessment of the latter is no greater than is assessed upon other moneyed capital in the hands of individuals. Within the limits of this authority the State may fully exercise its taxing powers, in strict obedience, however, to the requirements of its own Constitution.

As equality in taxation is the constitutional policy of this State, no scheme of taxation can be presumed to have been intended by the Legislature, which necessarily involves, in its practical results, the imposition of a greater proportionate share of its burdens upon moneyed capital, invested in the business of banking under National laws, than is imposed upon capital similarly employed under State authority. The law under consideration provides for the assessment of the real property of the State banks *eo nomine*, but does not authorize its assessment in any other form. Capital thus invested is, therefore, subjected to taxation but once for any one object. If a like mode of assessment had been intended in respect to the real property of the National banks, it must be presumed that some provision would have been made for deducting the value of such property from the total value of the shares, in order to fix upon a correct valuation of the latter for the purpose of taxation. The omission of any such provision was manifestly intentional, as the shares are required to be assessed at their true and full value, without any deduction whatever; and in this way the real property belonging to these associations is always subjected to its proper share of taxation.

The decision of the District Court, sustaining the assessment and tax in question, is reversed, and judgment ordered in accordance with the prayer contained in the answer of the bank.

## FIRST NATIONAL BANK OF ROCHESTER V. PIERSON.

(16 Albany Law Journal, 319.)

*Right of National banks to purchase notes.*

The purchase of a promissory note by a National bank for purposes of speculation is *ultra vires*, and the bank acquires no title to and cannot recover on a note so purchased. (*See note*, p. 639.)

**A**PPEAL by plaintiff from a judgment in favor of defendant in the District Court of Olmstead county. The action was upon a promissory note made by defendant and held by plaintiff. Such other facts as are material appear in the opinion.

*Jones & Gove*, for appellant.

*Charles C. Wilson*, for respondent.

CORNELL, J. It is expressly found as a fact by the District Court, before whom this cause was tried, without a jury, "that the transaction, under which the plaintiff claimed to have acquired the note in question, was a purchase and not a discount, or lending of money on the credit of it;" and we have no hesitation in saying that, upon the evidence, we fully concur with the court that such was undoubtedly the real nature of the transaction as intended by the parties thereto. As a conclusion of law from this finding, the court held "that the plaintiff, a National bank corporation, had no authority to purchase or traffic in promissory notes as choses in action, and did not in law acquire, by the supposed purchase, any title to the note in question, and cannot recover upon it in this action."

Upon the fact as thus found it will be seen that the only question presented is, whether a National bank, created and organized under the act of Congress, "to provide a National currency," etc., is authorized to deal or traffic in promissory notes, as a species of personal property, or to acquire any title to such paper by a purchase, made admittedly not in the way of discount, or by lending money on the credit of it. In the case of the *Farmers & Mechanics' Bank v. Baldwin*, 23 Minn. 198, it was expressly held that no

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power of this character is conferred by a law of the State, which authorizes State banks, organized under its provisions, "to carry on the business of banking by discounting bills, notes and other evidences of debt, by receiving deposits, by buying and selling gold and silver bullion, foreign coin, and foreign and inland bills of exchange, by loaning money on real and personal securities, and by exercising such incidental powers as may be necessary." And that a purchase of such paper, made not in the way of discount, was *ultra vires*, as outside the legitimate scope and purposes of such institutions.

Under the Congressional enactment, the authority which is given is "to exercise all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidence of debt, by receiving deposits, by buying and selling exchange, coin and bullion; by loaning money on personal security, and by obtaining, issuing and circulating notes according to the provisions of said title." U. S. Rev. Stats., § 5,136.

This is substantially like the State statute, which was under consideration in the *Farmers & Mechanics' Bank v. Baldwin*, *supra*. The word "negotiating," as used in this section, and likewise in section 29 of the same statute, is used in its ordinary and appropriate transitive sense, to indicate, not an act of purchase, but one of transfer, whereby the negotiated paper is passed from the holder or owner and put into circulation. Hence the incidental power to negotiate notes to the extent necessary to carry on the business of banking, simply implies an authority to realize upon such commercial paper as the bank may receive in the lawful conduct of its business, by negotiating, selling and transferring it by means of a rediscount, obtained or otherwise.

It gives no implied authority to speculate or traffic in paper of the character of the note in question, or in financial securities of any description. Morse on Banking, 4 and 5.

The powers, therefore, which are conferred by this section, in respect to the acquisition of commercial or business paper, are in no way affected or enlarged by the use of the term "negotiating."

In the absence of any authoritative exposition of the Federal statute in this regard, the principle settled in the *Farmers & Mechanics' Bank v. Baldwin* must be regarded as decisive of the present case.

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It is suggested by counsel for appellant, that upon the evidence this case is distinguishable from that of the *Farmers & Mechanics' Bank v. Baldwin*, *supra*, in that the note sued on here was indorsed by Butler, the holder at the time of the transfer to the plaintiff.

This fact is undoubtedly a distinguishing, though not conclusive test of the character of the transaction, and ordinarily raises a strong presumption denoting the existence of the relation of lender and borrower, between the bank and the party so making the transfer, and thereby indicates that the parties really intended a loan of money upon the credit of the paper so indorsed. And we have no doubt when such is the intention, "a borrower may," as was held in *Smith v. Exchange Bank of Pittsburg*, cited by appellant, "obtain the discount by a bank of the existing notes and bills of others of which he is the holder, as well as of his own paper made directly to the bank." And that the bank will thereby acquire a valid title to such paper because it makes the purchase by discount or through the exercise of its discounting powers. But where the acts of the parties, and the circumstances surrounding the transaction clearly rebut any presumption arising from the indorsement, and indisputably indicate the real nature of the transaction, intended by the parties to be, in the language of the court below, "an out and out purchase of the note, and not discounting it or lending money on the credit of it," the mere fact of indorsement is not sufficient to warrant the court in treating the transaction as something different from what was intended.

We fully concur with the court below in its conclusion as to the character of the transaction in this case.

It was an ordinary case of note shaving, pure and simple, for purposes of gain alone, outside the circle of any legitimate banking business, and foreign to any purpose for which those institutions are established. No loan was made or intended, nor was there any discount in the ordinary and legal acceptance of that term as applied to the business of banking.

*Judgment affirmed.*

**NOTE.**—As to the power of National Banks to purchase checks, notes, etc., see *First National Bank v. Harris*, *ante*, p. 590; *Leach v. Hale*, *ante*, p. 466; as to general powers of National banks, see *Wiley v. First National Bank*, *post*, and note.

The following is the decision in *Farmers and Mechanics' Bank v. Baldwin*, upon which the foregoing case was decided.

CORNELL, J. It is conceded that plaintiff's only title to the note in question rests upon its absolute purchase, as a

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chose in action, from one Patterson, the then owner, for a specific sum agreed upon and paid at the time of the purchase. Patterson did not indorse the note, nor expressly assume any obligation in connection with the transfer. Inasmuch as the ownership of the note by plaintiff is put in issue by the pleadings, the question necessarily arises whether the plaintiff had the corporate power to make the purchase in the manner it did, and whether, by such alleged purchase, it acquired any title which it could enforce against either the maker, or Baldwin, the indorser.

The doctrine that a corporation can only exercise such powers as are expressly granted, or as are incidental to its existence, or necessary to enable it to execute some one or more of its express powers, is too firmly established, both upon principle and authority, to admit of any doubt or discussion. This rule, by which courts must be governed in all inquiries into the existence of any corporate power, is aptly and justly declared to be axiomatic, in the opinion of the court in *First National Bank v. Ocean National Bank*, 60 N. Y. 278, 294; *Dartmouth College v. Woodward*, 4 Wheat. 518, 636; 2 Kent, 299; *School District v. Thompson*, 5 Minn. 280, 286. So, when an express power is granted, and the specific mode or manner of its exercise is prescribed, it can only be exercised in that particular way. *Bank of Augusta v. Earle*, 13 Pet. 519, 587; 2 Kent, 290, 299.

Plaintiff derives its corporate existence and powers from Gen. St., ch. 33, as it existed prior to the amendment in 1876 (Laws 1876, chapter 92); and, if it had the power in question at all, it must be found in some of the provisions of that chapter, which relates to banks and banking. Section 2 provides that "any person or association of persons may establish offices of discount, deposit, and circulation, and become incorporated, upon the terms and conditions, and subject to the liabilities prescribed in this chapter." Section 11 prescribes the manner in which such corporation shall be formed, and declares that upon such its formation as a body politic and corporate by its assumed name, it shall, by such name, "have power to contract and be contracted with, sue and be sued, and shall have all other powers, privileges and immunities incident to corporations and applicable to the ends of such establishments,

subject to the restrictions and provisions of this chapter." Section 13, which specifically defines the powers of such corporations, is as follows: "Such person or association has power to carry on the business of banking, by discounting bills, notes, and other evidences of debt, by receiving deposits, by buying and selling gold and silver bullion, foreign coin, and foreign and inland bills of exchange, by loaning money on real and personal securities, and by exercising such incidental powers, as may be necessary to carry on such business."\* Section 33 provides that "such bank or banking association may demand and receive for loans on real and personal security, or for notes, bills, or other evidences of debt discounted, such rate of interest as may be agreed upon by the parties, not exceeding 12 per cent per annum; subject, however, to such general laws regulating and fixing the rate of interest as may hereafter be passed by the Legislature; and it shall be lawful to receive the interest in advance, according to the ordinary usage of banking institutions, and in general to do all things, and have all the privileges, incident to banking associations or corporations." Section 43 prescribes a penalty for any violation of the provisions of the chapter.

These sections contain all the provisions of law having any bearing upon the question under consideration. In construing them, regard must be had to the general nature and purpose of banking institutions, and it must be assumed that the language and terms employed in framing the statute were so used in their then ordinary and appropriate sense — nothing appearing in the enactment itself to show a different meaning.

Bouvier defines a bank to be "an institution authorized to receive deposits of money, to lend money, and to issue promissory notes." These are its principal attributes. *First Nat. Bank v. Ocean Nat. Bank*, 60 N. Y. 278, 288. Banks are of three kinds, known as banks of discount, deposit and circulation, though usually in every American system of banking, all these functions are united in the same institution, as is the case under the present law. Gen. St., ch. 33, § 10. Their chief purpose and design are to furnish safe places of deposit for money, to facilitate its payment and exchanges between different persons and places — thereby serving as clearing-houses were located — and

\* In this section, as amended by Laws 1880, ch. 85, the last clause of the above quotation reads: "And by exercising all the usual and incidental powers and privileges belonging or pertaining to such business."



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to accommodate the business public with loans or discounts to such an extent and on such terms as are compatible with their continued safety and solvency, and the legitimate wants and demands of trade and commerce. McCullough's Com. Dict., vol. 1, p. 63; Am. Cyc., vol. 2, title *Banks*. In view of these public purposes, in all legislation authorizing their creation, it has been usual to designate the character of the securities which they shall be permitted to take upon their loans or discounts, to limit the rate of interest and to prescribe such other wholesome regulations as experience has suggested to be necessary to subserve the purposes of their creation, and to protect alike the banks and the public from the evils of general insolvency—sure to follow the general absorption and employment of the banking capital of a country in purely speculative enterprises for purposes of private gain alone.

Under the act in question the business of banking is authorized to be carried on "by discounting bills, notes and other evidences of debt, and by loaning money on real and personal security," (§ 13) and the rate of interest allowed to be charged for such discounts and loans is limited to 12 per cent, taken in advance. (§ 35.) The obvious intent of this legislation was to secure to the public business-loans an accommodations at what was then regarded reasonable and not exorbitant rates of interest, and also to protect the shareholders of banks, and the banks themselves, against the risk of loss from inadequate securities such as would likely be taken under the tempting influence of high rates of interest, regulated only by the necessities of borrowers and the cupidity of bank directors. If, however, as is claimed on the part of plaintiff, associations organized under this enactment possess the unlimited power of dealing in promissory notes and other evidences of debt as property and choses in action, the same as individuals, then, obviously, this restriction upon the rate of interest is a practical nullity, as the bank has the power of evading it at any time by simply buying the paper instead of loaning money upon it. No judicial construction leading to such a result is allowable unless required by some clear and unmistakable provision of the statute.

It is not contended, and cannot be, that the power to purchase and traffic in promissory notes, as a species of personal property, belongs to any bank as a necessary incident to its existence, or to the exercise of any of its powers as a bank of circulation and deposit

alone. It is not conferred, in express terms, by any provision of the statute. It must exist, therefore, if at all, as an incident necessary to enable it to transact its business as a bank of discount. A bank of discount alone is defined to be "one that furnishes loans upon drafts, promissory notes, bonds, or other securities." Am. Cyc., vol. 2, title *Banks*. "The discounting of notes," says SPENCER, J., in *People v. Utica Ins. Co.*, 15 Johns. 358, 392, "is one mode of lending money." In *New York Firemen Ins. Co. v. Ely, Cowen*, 678, 699, SUTHERLAND, J., adopts the same definition; and GARDINER, J., in delivering the opinion of the court in *Talmage v. Pell*, 7 N. Y. 328, 343, declares that "to discount bonds, in banking, is only a mode of loaning money." In *Fleckner v. Bank of United States*, 8 Wheat. 338, 350, STORY, J., uses the following language: "Nothing can be clearer than that, by the language of the commercial world and the settled practice of banks, a discount by a bank means, *ex vi termini*, a deduction or drawback made upon its advances or loans of money upon negotiable paper, or other evidences of debt, payable at a future day, which are transferred to the bank. We suppose that the Legislature used the language in this its appropriate sense." The correct proposition, as we understand it, is concisely stated in the syllabus of the case of *Niagara County Bank v. Baker*, 15 Ohio St. 68, as follows: "To discount paper, as understood in the business of banking, is only a mode of loaning money, with the right to take the interest allowed by law in advance."

Discounting a note and buying it are not identical in meaning, the latter expression being used to denote the transaction "when the seller does not indorse the note, and it is not accountable for it" (1 Bouv. Law Dict., title *Discount*, citing Pothier De l'Usure, 128), and it is admitted that such was the character of the transaction in this case. In view of this understanding of the functions of a bank of discount, the legal signification attached to the word "discount," and the distinction between it and the word "purchase," when applied to the business of banking, it is obvious that the power "to carry on the business of banking, by discounting notes, bills, and other evidences of debt," is only an authority to loan money thereon, with the right to deduct the legal rate of interest in advance. This right can be fully enjoyed without the possession of the unrestricted power of buying and dealing in such securities as choses in

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action and personal property. Though, as is urged by plaintiff, the bank acquires a title to discounted paper, and hence may, in a certain sense, be said to have purchased it, yet it is a purchase by discount—which is permitted—and does not involve the exercise of a power of purchase in any other way than by discount.

It follows from these premises that the powers claimed cannot be regarded as necessarily incidental to that branch of the banking business which pertains to a bank of discount alone. Except as a bank of circulation, the specific powers conferred upon institutions organized under the provisions of this chapter are all enumerated and defined by section 13. Among them is an express grant of power to deal in certain articles of personal property, to wit, "buying and selling gold and silver bullion, foreign coin, and foreign and inland bills of exchange." Promissory notes, however, are not included. Clearly, as is suggested by GARDINER, J., in *Talmage v. Pell*, 7 N. Y. 328, the maxim *expressio unius*, etc., is applicable here. If an express grant of power was deemed necessary to enable a bank created under this statute to deal in "gold and silver bullion, coin and bills of exchange," and to invest its funds therein, it is difficult to see why it was not also given as to promissory notes, if it was intended that the bank might ever exercise any such power in respect to them.

In the itemized statement of assets and liabilities, which each bank is required to make quarterly, by section 34 of the statute, it is made the duty of the bank to report, among other things, the aggregate amount of its loans and discounts, and also, separately, its "promissory notes." No inference can be drawn from this that the notes here referred to are any other than those lawfully acquired by the bank, through the exercise of its conceded powers, in making loans on personal securities and in discounting commercial paper. In both these ways promissory notes may be lawfully obtained and held, and, if knowledge of the amount of such kind of paper was deemed important for any purpose, the provision in question was not only pertinent, but absolutely necessary; for it is apparent that a mere statement of the total amount of its loans and discounts would not disclose the

desired information. The obvious purpose of the section was, not to define the powers of these institutions, or the manner in which they might be exercised, but to procure a true and correct statement of their condition, at stated periods, for the use and benefit of the public; and, hence no power can be implied from any of its provisions, unless the implication is rendered necessary and unavoidable, both from the language and the context. All the provisions of this chapter of our laws having any bearing upon the question under consideration are essentially the same as those contained in the New York statute upon the same subject, from which ours seems to have been copied. Section 13 of our statute, in particular, which relates to the powers of these associations, is identical in substance, and nearly in language, with a similar section in the New York statute. In the case of *Talmage v. Pell*, 7 N. Y. 328, the question arose whether a bank organized under that statute had any legal capacity to purchase the negotiable bonds of the State of Ohio, for purposes of gain or profit. After full and exhaustive argument, the Court of Appeals decided, in an opinion covering the whole ground, that it had no such power.

In the case of *Niagara County Bank v. Baker*, decided by the Supreme Court of the State of Ohio (15 Ohio St. 68), the same statute came under review, upon a state of facts presenting the precise point involved in this case, and it was held that a power to carry on the business of banking, by discounting promissory notes, was not a power to purchase such notes, but to loan money thereon. Recognizing the principle of these decisions as correct, it must be regarded as decisive of the present case.

Having no corporate capacity to make the contract of purchase, the plaintiff never acquired any title to the note in suit, and the attempted act of purchase was strictly *ultra vires*, and conferred no rights whatever. *Wyley v. First Nat. Bank of Brattleboro*, 47 Vt. 546; S. C., 19 Am. Rep. 122; *Mathew v. Skinker*, 62 Mo. 329; S. C., 21 Am. Rep. 425; *Kansas Valley Nat. Bank v. Rowell*, 2 Dillon, 371 (ante, p. 264); *Hoffman v. John Hancock Mut. Life Ins. Co.*, 92 U. S. 161.

Upon this ground the order denying a new trial is affirmed.

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Horne v. Green.

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## HORNE V. GREEN.

(52 Mississippi, 452.)

*Taxation of National bank bills.*

The circulating notes of National banks are not subject to taxation.\*

**B**ILL in equity for an injunction to restrain Horne, tax collector from selling certain real estate, levied upon by him for taxes assessed against complainant, on National bank notes and other property. The Chancellor held that the tax on the National bank notes was legal. Green appealed.

*W. L. Nugent*, for Horne.

*Frank Johnston*, for Green.

PEYTON, C. J., † [After deciding that United States treasury notes (part of the property assessed), were not taxable.]

2. The National bank notes issued by the National banking associations, under authority of Congress, are also obligations of the National government, the only difference between them and the legal-tender notes being that the government is primarily liable for the latter, and secondarily liable for the former, upon the failure or default of the National banks issuing the notes. Acts of February 25, 1863, March 3, 1863, June 3, 1864, June 30, 1864.

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\* See, *contra*, *Board of Commissioners v. Elston*, *ante*, p. 425.

† The opinion of Chief Justice PEYTON was withdrawn upon a motion for a reargument. Upon the reargument it was sustained on this point without comment and was reported as above, by order of Chief Justice SIMRALL.

## COFFEY v. THE NATIONAL BANK OF MISSOURI.

(46 Missouri, 140.)

*Bank — Reorganization under United States law — Effect of change — Measure of damages.*

When a bank, organized under the laws of a State, reorganizes as a National bank under the act of Congress, it escapes none of its liabilities by the change.\*

In an action of trover against a bank, after its reorganization as a National bank, for the value of certain special deposits in coin made prior thereto; *held*, that the measure of damage was the value of the coin at the date of its conversion, with interest thereon.

THE plaintiff sues in trover to recover the value of a special deposit originally made with the Bank of the State of Missouri, March 20, 1865, consisting of \$90.95 in silver and \$1,415 in gold coin. It is alleged that the defendants, July 1, 1867, converted the deposit to their own use, the bank at that time having taken its present name and become organized as a National institution. The answer denies both the fact of the deposit and of the alleged conversion, but admits that certain packages were deposited, and avers that they were duly returned to the plaintiff.

At the trial the plaintiff read in evidence the act of March 5, 1866 (Sess. Acts, 1865-6, p. 15), authorizing the Bank of the State of Missouri to reorganize as a National institution under the act of Congress, and also gave other evidence tending to prove the allegations of the petition, and to show that the reorganization contemplated by the act of March 5th was in fact effected prior to the alleged conversion of the plaintiff's deposit, and that said deposit had passed into the possession of the defendant. No available objection was made to the proofs. At the instance of the plaintiff the court, among other instructions, directed the jury, in case they found for the plaintiff, to assess as damages for the alleged conversion the currency value of the coin, the rate of premium having been agreed on between the parties. The defendants controvert

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\* See *Kelsey v. National Bank of Crawford*, *post*; *Maynard v. Bank*, *post*.

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Coffey v. The National Bank of Missouri. \*

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the correctness of this instruction, and deny their legal accountability for the acts or negligence of the Bank of the State of Missouri.

*C. F. Burness*, for appellant.

*Crews & Laurie*, for respondent.

CURRIER, J. 1. By the act of Congress making provision for a National currency (U. S. Stats. at Large, chap. 106, p. 112, § 44), it is provided "that any bank incorporated by special law, or any banking institution organized under a general law of any State, may, by authority of that act, become a National association under its provisions, by name prescribed in its organization certificate; and in such cases the articles of association and the organization certificate required by the act may be executed by a majority of the directors of the bank or banking institution; and that said certificate shall declare that the owners of two-thirds of the capital stock have authorized the directors to make such certificate, and to change and convert the said bank or banking institution into a National association under said act; and a majority of the directors, after executing said articles of association and organization certificate, shall have power to execute all other papers, and do whatever may be required to make its organization perfect and complete as a National association. The shares of any such bank may continue to be for the same amount each as they were before said conversion; and the directors aforesaid may be the directors of the association until others are elected or appointed in accordance with the provisions of said act." Under the legislation of the State and of Congress, the Bank of the State of Missouri became a National banking association, as the evidence tended to show, and as the jury found the fact to be. It thus passed from one jurisdiction to another; but its identity was not thereby necessarily destroyed. It remained substantially the same institution under another name. The transition did not disturb the relation of either the stockholders or officers of the corporation, nor did it enlarge or diminish the assets of the institution. These all remained the same under the National as they were under the State organization. The bank neither lost any of its assets nor escaped any of its liabilities by the change. The change was a transition, and not a

new creation. See *Grocers' National Bank v. Clark*, 48 Barb. 26;\* *Thorp v. Wegefarth*, 56 Penn. St. 82.

2. The court laid down a correct rule of damages. It is but plain justice that the plaintiff should have back his deposit in specie, or else its value in currency. The rule of damages in trover is the value of the converted property at the date of the conversion, with the interest thereon. The plaintiff was entitled to the marketable value of his coin at that time. This subject is discussed in *The Bank of the State, etc., v. Burton*, 27 Ind. 426. There the court say: "While we have two kinds of money, made by statute exact equivalents for the purposes of ordinary tender and payment, and yet of notoriously irregular values in commerce, results will now and then follow the application of the law which are not consonant with justice. Must it be so in this case? It has been often held, that, where the amount of debt has been ascertained, the courts cannot, in view of the act of Congress, recognize any difference between the gold dollar and the legal tender note of the denomination of one dollar as a means of tender or payment. But it does not follow that when the bailee of specific gold coin, to be redelivered in specie, sells the same for a premium, and fails to redeliver it on demand, he shall not answer in damages to the amount which he has realized by the conversion. That he should have the right to make a profit for himself by his own wrongful act is a proposition having no foundation in justice, and is not sanctioned by any principle of law."

The case referred to was decided in accordance with the foregoing views, the court holding, that, when a bailee converted to his own use coin intrusted to his care, the recovery should be for the currency value of the coin. See also *Frothingham v. Morse*, 45 N. H. 545. In the case at bar the verdict of the jury established the fact that the plaintiff left with the defendant, or with the Bank

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\* In this case it was held that a right of action against an officer of a State bank for fraudulent misapplication of the property of the bank was assignable and passed as assets from such State bank on its reorganization as a National bank by operation of Laws 1865, ch. 97, § 6, which provided that as soon as every State bank should receive the "certificate of the Comptroller of the Currency authorizing it to commence the business of banking under the laws of the United States, all the assets, real and personal, of the said bank shall immediately, by act of law, and without any conveyance or transfer, be vested in and become the property of the National Banking Association into which said bank shall have been converted."

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Matthews v. Skinker.

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of the State of Missouri — which, for the purposes of this suit, is the same thing — the amount of coin stated in his petition, as a special deposit, to be returned in specie on demand ; that demand of it was duly made, and that the defendant neglected and refused to return the deposit upon such request. Such refusal was evidence of conversion, and, unexplained, was conclusive of the fact. There was no explanation, and the defendant is liable for the conversion, and, as already stated, the court gave the correct rule of damages applicable to the facts of the case.

3. The question as to the measure of diligence does not arise in the case. The bank does not put its defense upon the ground that the coin committed to its care was lost while in its custody, without fault or negligence on its part, or on the part of its officers. That is not its line of defense. It denies that it ever had possession of the coin, and insists that if it ever did have it the same was returned to the plaintiff. So the pleadings stand, and the case appears to have been tried upon that theory. The question, therefore, of diligence on the part of the bailee does not come up. It would seem somewhat absurd for a party to insist that he had kept with reasonable care, as a gratuitous bailee, and faithfully returned what never came to his possession.

Some other objections of a technical character are made in the brief of the defendant's counsel, but it is not perceived that the court committed any error that would warrant a disturbance of the judgment. It will, therefore, be affirmed. The other judges concur.

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MATTHEWS V. SKINKER.

(62 Missouri, 329.)

*National bank — Taking security on real estate by, ultra vires.*

A National bank has no power to take a deed of trust or mortgage on real estate to secure a contemporaneous loan, and a sale under such deed or mortgage to satisfy the loan will be enjoined.\*

**B**ILL for an injunction to restrain the sale of real estate. The opinion states the case.

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\* See *Fowler v. Scully*, post, and note.

*Britton A. Hill*, for plaintiffs in error.

*Noble & Orrick*, for defendant in error.

WAGNER, J. The error complained of in this case is the action of the court in rendering a perpetual injunction restraining the trustees from selling the plaintiff's property. From the record it appears that the plaintiff executed her note payable to Sterling Price & Co. for \$15,000, due two years after date, and to secure payment of the note she made a deed of trust, bearing even date with the same, on certain real estate belonging to her. The note and deed of trust were delivered to Sterling Price & Co., who afterward transferred them to the Union National Bank of St. Louis, a banking institution organized under the act of Congress, to secure a loan for \$15,000, advanced to Price & Co. by the bank. Price & Co. having failed to pay the money advanced on the note, and secured by the deed of trust, the trustee, at the request of the bank, advertised the property for sale, and the plaintiff filed her petition to enjoin the trustee and the bank from proceeding with the sale. Whether the deed of trust in the hands of the bank amounted to a valid security, which could be enforced in payment of the money advanced, depends upon the construction of the act of Congress providing for the formation of National Banking Associations. R. S. (U. S.), p. 998. By section 5136 of the Revised Statutes, authority is given to the banking associations "to exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion, by loaning money on personal security," etc. By section 5137 it is provided that: "A National Banking Association may purchase, hold and convey real estate for the following purposes, and for no other: First, such as shall be necessary for its immediate accommodation in the transaction of its business. Second, such as shall be mortgaged to it in good faith by way of security for debts previously contracted. Third, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings. Fourth, such as it shall purchase at sales under judgments, decrees or mortgages held by the association, or shall purchase to secure debts due to it."



The act, as will be thus seen, gives the association power to loan money on personal security, and to purchase, hold and convey real estate in certain specified cases.

The general principles defining the extent and mode of exercise of corporate powers are well settled and have often been passed upon by this court. Corporations have only such powers as are specially given by their charters, or are necessary to carry into effect some specified power. *St. Louis v. Russell*, 9 Mo. 507; *Blair v. Perpetual Ins. Co.*, 10 id. 559; *Ruggles v. Collier*, 43 id. 353. They must act strictly within the scope of the powers conferred on them by the act calling them into being; and where a grant of power from the Legislature is relied on, the mode prescribed in that grant for doing any particular thing must be pursued according to the law creating them. *Han. & St. Joe R. R. Co. v. Marion Co.*, 36 Mo. 294. The distinction between natural persons and corporations is, that while the former may make any contract not prohibited by law or against public policy, the latter can exercise no powers not expressly conferred on them by their charters. *Bank of Louisville v. Young*, 37 id. 398. In *Great Eastern Railway v. Turner*, L. R., 8 Ch. App. 152, Lord Chancellor SELBORNE gave a brief and comprehensive statement of the law applicable to questions of corporate powers. He said: "The company is a mere abstraction of law. All that it does, all that the law imputes to it as its act, must be that which can be legally done within the powers vested in it by law. Consequently an act, which is *ultra vires*, and unauthorized, is not an act of the company, in such a sense, as that the consent of the company to that act can be pleaded." As this case depends upon the interpretation of a National statute we may refer to some of the cases in the United States Supreme Court to see what view that tribunal has taken of the law construing the powers of corporations.

In *The Bank of the U. S. v. Dandridge*, 12 Wheat. 64, the rule is stated to be that "whatever may be the implied powers of aggregate corporations by the common law, and the modes by which these powers are to be carried into operation, corporations created by statute must depend, both for their powers and the mode of exercising them, upon the construction of the statute itself."

In *Head v. Providence Ins. Co.*, 2 Cranch, 127, Chief Justice MARSHALL defines the powers and limitations of statutory corporations with great clearness as follows: "Without ascribing to this

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body, which in its corporate capacity is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may be correctly said to be precisely what the incorporating act has made it; to derive all its powers from that act and to be capable of exerting its faculties only in the manner the act authorizes." Judge STRONG, now of the Supreme Court of the United States, in delivering the opinion of the Pennsylvania court, in a case where the National Banking Law was directly brought in question, said: "The bank is a creature of the act, dependent on it for all its powers, and controlled by all the restrictions which the act imposes." *Venango Nat. Bank v. Taylor*, 56 Penn. St. 15 (*post*).

In all the cases where questions have been raised respecting the powers and liabilities of National banks, it has been invariably held that the banks have only the powers conferred upon them in the act providing for their formation. That from that act they derive their sole authority, and that they must be strictly governed by it and kept within the line of its limitations. In *Wiley v. The First Nat. Bank of Brattleboro*, 47 Vt. 546; S. C., 19 Am. Rep. 122 (*post*), it was decided, that the taking of special deposits, to keep merely for the accommodation of the depositor, was not within the authorized business of the banks organized under the act of Congress, and that the cashiers of such banks had no power to bind them on any express contract accompanying, or on any implied contract arising out of such taking. So, in a recent case in Maryland (*Weckler v. The First Nat. Bank of Hagerstown*, 42 Md. 581 [*ante*, p. 533]), it was held that in the act authorizing the incorporation of National banking associations, the kind of banking was limited and defined, and as the act contained no grant of power to engage in bond-brokerage, it was, therefore, prohibited to the banks, and that it was not necessary to the purpose of their existence, or in any sense incidental to the business of banking. It was, accordingly, decided in an action of deceit against a National bank, seeking to recover damages for the alleged fraudulent representations of its tellers made in the sale to the plaintiff of certain railroad bonds, that the business of selling bonds on commission was not within the scope of the powers of National banking associations, and that the bank could not, under any circumstances, carry it on, and being thus beyond its corporate

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powers, the defense of *ultra vires* was open to it, and that it was not responsible for any false representations made by its teller by which the plaintiff might have been damaged.

The very question which comes up for adjudication in this case was presented and passed upon in *Fowler v. Scully*, 72 Penn. St. 456; S. C., 13 Am. Rep. 699 (*post*). In that case Fowler, without any previous indebtedness, gave to the First National Bank of Pittsburgh a mortgage to secure the bank for notes, etc., thereafter to be discounted for him. Upon a proceeding for foreclosure the court decided that lending money by a National bank on mortgage on real estate security was *ultra vires* and forbidden and the mortgage was declared to be void.

National banks possess just such powers as the act incorporating them gives to them—no more. They are the creatures of the act, and controlled by all its restrictions and limitations. Express power is given to them to “carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by buying and selling exchange, coin and bullion; by loaning money on personal security; by obtaining, issuing and circulating notes according to the provisions of the act.” Banks are formed and organized for commercial purposes, and not to deal in real estate. Their business is to discount and negotiate promissory notes, drafts, bills of exchange and other evidences of debt, the buying and selling of bills, bullion, and lending of money on personal security. To permit them to loan their money on real estate security would be destructive of their efficiency and defeat the object had in view in their creation. Instead of being agents for purposes of trade, dealing in commercial paper, discounting notes and furnishing the necessary facilities for loans, they would have their capital locked up in landed property, and thus be powerless to carry on the business which induced their organization. These speculations in real estate are also hazardous, and have no legitimate connection with the business of banking; they require the employment of outside parties to look after the land and examine titles and are apt to embark the bank into enterprises which sooner or later will end in insolvency. Congress doubtless had these considerations in view when it provided that the money should be loaned on personal security. When the mode of personal security was declared and pointed out, that excluded all others, for the maxim *expressio unius est exclusio alterius* must prevail in this case.

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Richards v. Kountze.

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But the intention does not rest merely on the provision requiring personal security on loans. Section 5137 specifies for what purposes National banking associations may purchase, hold and convey real estate, and forbids their dealing in that kind of property for any other purposes. They may purchase and hold so much real estate as may be necessary for their immediate accommodation in the transaction of their business ; such as may be mortgaged to them in good faith by way of security for debts previously contracted ; such as shall be conveyed to them in satisfaction of debts previously contracted in the course of their dealings, and such as they shall purchase at sale under judgments, decrees or mortgages held by them, or shall purchase to secure debts already due. These are the specified instances, and the only instances in which it is permissible for National banking associations to purchase or hold real property. Aside from the real estate necessary for the transaction of their business, they can only acquire that description of property to enable them to secure themselves for debts previously contracted. But in no case can they loan money on the faith of real estate security where the debtor was not previously indebted to them. If they do, the security taken is *ultra vires* and void, and may be pleaded by the party as a defense against its enforcement.

The case at bar shows that there were no previous dealings between the plaintiff and the bank ; the bank loaned the money and took the deed of trust as security. This it had no power to do, and the judgment of the court below will be affirmed.

All the judges concur, except Judge VORIES, who is absent.

*Judgment affirmed.*

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RICHARDS v. KOUNTZE.

(4 Nebraska, 200.)

*Assignment of mortgage to National bank.*

Notes secured by mortgages were assigned to a National bank, and by it to plaintiff. *Held*, in an action of foreclosure, that the mortgages were not extinguished by the assignment to the bank, and were valid in the hands of the plaintiff, he being a *bona fide* purchaser.

In the absence of evidence showing the purpose and object of the assignment to the bank, it cannot be presumed that it was for a debt created *in presenti*, in violation of the National Banking Act.

## Richards v. Kountze.

*Semble*, that the limitations of the National Banking Act apply to transactions in real property, independent of legitimate banking operations, and not to mortgage securities.\*

**A**CTION upon four promissory notes, executed by Richards, the plaintiff in error, dated April 6, 1870, payable one year after date with interest at the rate of ten per cent per annum, secured by mortgages upon real estate situated in Omaha, and made payable to the order of John A. Parker. The notes and mortgage securities were assigned by Parker to Augustus and Herman Kountze, who afterward assigned them to the First National Bank, by whom they were assigned to Herman Kountze, the defendant in error, who brought this suit to foreclose the mortgages and recover the debt secured by them.

Section 28 of the National Banking Act provides as follows:

“It shall be lawful for any such association to purchase, hold, and convey, real estate as follows :

1. Such as shall be necessary for its immediate accommodation in the transaction of its business.

2. Such as shall be mortgaged to it in good faith by way of security for debts previously contracted.

3. Such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings.

4. Such as it shall purchase at sales, under judgments, decrees or mortgages, held by such association, or shall purchase to secure debts due to said association.

Such association shall not purchase or hold real estate in any other case or for any other purpose than is specified in this section.” 13 U. S. Statutes at Large, 107.

The court below rendered a decree in favor of Herman Kountze for the principal of the notes with interest at ten per cent, and for a sale of the mortgaged premises. Richards brought the case here by petition in error.

*T. W. T. Richards, pro se.*

*George I. Gilbert, for defendant in error.*

GANTT, J. [After deciding another point.] Again as a defense, it is contended that when the notes passed into the hands

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\* See *Fowler v. Scully*, *post*, and note.

of the bank, the mortgage securities became extinguished, on the ground, as alleged, that under the act of Congress in relation to National banking associations, the bank could not hold and convey real estate under the purchase of the mortgage securities in this case; hence, the mortgage securities became separated from the debt.

Many authorities were cited to show that the mortgage security is an accessory or incident to the debt, or the instrument given as the evidence of the debt; and that the mortgage security cannot be separated from the debt; or as is said in the case of *Jackson v. Blodgett*, 5 Cow. 296, the mortgage "cannot exist as an independent security in the hands of one person while the bond belongs to another." This proposition is true, and a simple transfer of the mortgage without the debt, or note which is the evidence of the debt, is a nullity, for distinct from the debt, the mortgage has no determinate value; and also the transfer of the debt only reserving the pledge as an independent security, renders the mortgage a nullity. In legal parlance, the pledge being an incident to the debt, so far as regards its determinate value, it cannot be detached from the debt. It seems, therefore, that in order to work an extinguishment of the mortgage security, the transfer must be with intent to separate the one from the other; that is, to detach the debt so as to leave the mortgage a separate and independent security.

The mere fact, however, that after the assignment of the debt, the mortgage remains in the hands of the mortgagee, or in the hands of any person other than the assignee of the debt, will not of itself work an extinguishment of the mortgage security. To do so, the mortgage must be held to operate as a separate independent security. It is said by a very able jurist that "if a mortgage is made to one person to secure several notes or bonds made to him, and the mortgagee assign the notes or bonds to different persons, but continues to hold the mortgage security in his own name, he will hold it in trust for the several persons to whom he has assigned the mortgage notes, bonds, or other evidences of the debt due him." Perry on Trusts, § 593. This is upon the principle that the mortgage security is an incident to the debt, and follows or passes with the assignment of the debt, unless by the intent of parties it is detached from the debt.

In the case at bar, the evidence will not at all justify the conclusion that it was the intention of any one of the parties con-

cerned, to separate or detach the mortgage securities from the debt, and therefore the point so strongly urged by the counsel for plaintiff in error will not, as an abstract principle of law, apply to this case.

But did the assignment to the bank of itself extinguish the mortgage securities? Under the act of Congress, the bank is permitted to hold and convey such real estate as shall be mortgaged to it in good faith by way of security for debts previously contracted or such as shall be conveyed it in satisfaction of debts previously contracted in the course of its dealings. Now whether the sale and assignment of the notes to the bank were not made in satisfaction of or security for a debt previously contracted is not at all clear from the evidence reported in this case. It is not shown by the evidence for what purpose the sale and assignment were made to the bank; and to say that the notes and mortgages were assigned to the bank for a debt created *in presenti* would be the assumption of a fact not proved in the case. And it will hardly be urged that the court shall presume a person or a corporation to have been guilty of the violation of law; and hence, it will not be presumed that the bank received the notes and mortgages for a debt created *in presenti*. It has an undoubted right to take and hold such securities for a debt previously contracted. Was it not the intention of Congress to prohibit banking associations, organized under the law, from dealing in real property as a business independent of their legitimate banking operations? This would seem to be the purpose of the limitations of the act; and from all that appears in the record, there is nothing to justify the conclusion that these limitations have been transgressed in this case.

But the notes and mortgages passed into the hands of a person in no way incapacitated to take and receive them. Herman Kountze, the plaintiff in the court below, and defendant in error here, became the owner of them in good faith for value, and in *Willmouth v. Crawford*, 10 Wend. 343, it was contended that the note was given to a corporation for a purpose or consideration for which the law forbid the corporation to receive "any note or other evidence of debt in payment." The court held that "conceding the note to be taken without authority, it is valid in the hands of a *bona fide* holder."

It, however, appears that while the notes remained in the hands of the bank, Richards, the plaintiff in error, paid to it, in excess of

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Davis v. Cook.

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the interest stipulated in the original contract, the amount of \$8.96. This sum, according to the rule stated in the fourth proposition, should have been deducted from the debt as of the time when it was paid, and the finding and decree should have been for \$949.28. Therefore the finding must be made, and decree now rendered in this court, in favor of Herman Kountze and against T. W. T. Richards in accordance with the views expressed in this opinion.

*Decree accordingly.*

MAXWELL, J., concurred. LAKE, Ch. J., did not sit, having tried the cause in the court below.

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DAVIS v. COOK.

(9 Nevada, 134.)

*National bank citizen of State where located.*

A National bank is a citizen of the State wherein it is located.\*

ACTION by Davis as receiver of the First National Bank of Nevada against Cook and others on two promissory notes for six thousand five hundred dollars. Two of the defendants petitioned to have the cause removed into the Circuit Court of the United States on the ground that they were non-residents of the State, one of them claiming to be an alien and the other a resident of California. The other defendant was not served with the summons.

The District Court refused to remove the cause, and defendant appealed.

*Mesick & Wood*, for appellants.

*Ellis & King*, for respondent.

BELKNAP, J. [After holding that the defendants were not entitled to a removal under the Judiciary Act of 1789, as the application

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\* See *Cooke v. State National Bank*, *post*; *Manufacturers' National Bank v. Baak*, *ante*, p. 161; *National Park Bank v. Gunst*, *post*.



was not made when they entered their appearance ; nor under the act of 1867, as that act does not apply where one of the defendants is an alien.]

It is urged by respondent in justification of the ruling of the District Court upon defendant's motion for removal that as the First National Bank of Nevada was incorporated under an act of the Congress of the United States it is a citizen of the United States, and cannot be treated as a citizen of this State for jurisdictional purposes. This question was thoroughly investigated by Judge BLATCHFORD, in the case of the *Manufacturers' National Bank v. Banck*, 2 Abb. (U. S.) 232 (*ante*, p. 161). The various provisions, in respect to the "location" of banking associations incorporated under the act of Congress of June 3, 1864, entitled, "An act to provide a National currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," are there discussed. By the 6th section of the act it is provided that the persons uniting to form a banking association under the act shall specify in an organization certificate the place where its operations of discount and deposit are to be carried on, designating the State, territory or district, and also the particular county and city, town or village. And by the 8th section it is provided that its usual business shall be transacted at an office or banking-house located at the place specified in its organization certificate. The 9th section provides that the affairs of such banking association shall be managed by a board of directors, at least three-fourths of whom shall have resided in the State, territory or district in which such association is located one year next preceding their election as directors, and be residents of the same during their continuance in office. Further sections speak of the place where the association is "located" and "established." "It is quite apparent from all of these statutory provisions," says Judge BLATCHFORD, "that Congress regards a National banking association as being 'located' at the place specified in its organization certificate. If such place is a place in a State, the association is located in the State. It is, indeed, located at but one place in the State; but when it is so located, it is regarded as located in the State. The requirement that at least three-fourths of the directors of the association shall be residents, during their continuance in office, in the State in which the association is located, especially indicates an intention on the part of Congress to regard the association as belonging to

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such State. Three-fourths of the legal representatives of the unknown associates forming the corporation, with which representatives any person dealing with the corporation must deal, are required to reside in the State where the corporation is 'located.'" A corporation existing by virtue of an act of the Congress of the United States must be considered a citizen of the United States. But a citizen of the United States, resident in any State in the Union, is a citizen of that State. *Gaines v. Ballou*, 6 Pet. 761. The residence of the National Bank being in Nevada, it follows that it is a citizen of Nevada. The motion to remove the cause to the Federal Court was properly denied.

[The court then disposed of other questions not here material.]

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FIRST NATIONAL BANK V. PETERBOROUGH.

(56 New Hampshire, 38.)

*National banks — Taxation of surplus capital.*

Where the shares of National banks are by statute required to be taxed at their par value, the surplus fund of such banks, in excess of the amount they are required by law to keep on hand, is taxable by the states in which the banks are located.\*

**P**ETITION by the First National Bank for the abatement of a tax. The following facts were agreed upon:

In April, 1873, the selectmen of Peterborough, legally chosen and qualified, assessed, among other taxes for that year, a tax against said bank upon ten thousand dollars of its surplus, amounting to one hundred and seventy-five dollars; that at the time of the assessment of the tax the undivided profits of the bank were more than ten thousand dollars in addition to and in excess of nine thousand six hundred and fifty-four dollars and thirteen cents, the ten per cent of net profits required by the National Currency Act of the United States to be kept on hand by the bank as a sur-

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\* See *State v. City of Newark*, post, 672. In those States where the shares are taxed at their market value, the surplus as surplus is, of course, not taxable, that being taken into account in fixing the market value.—R&P.

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plus fund; that before the assessment of the tax by the selectmen they called upon the proper officers of the bank to exhibit to them an account of the surplus capital of the bank, which exhibit the bank, by their officers, refused to make, claiming that the same was not taxable property. The selectmen thereupon set down the surplus capital of the bank at ten thousand dollars, and assessed the same at the same rate as other property in town. The selectmen placed said tax with others in the hands of John H. Steele, collector of taxes in said town, for collection. Steele gave the bank notice in writing, dated November 6, 1873, requesting them to pay the tax. The bank, on February 21, 1874, presented their petition to the selectmen recited in this bill; this petition was signed by five of the directors of the bank; and the selectmen refused to abate the tax in accordance with the prayer of the petition. The questions arising on the foregoing agreed statement of facts were transferred to this court by RAND, J.

*E. M. Smith and Morrison & Hiland*, for plaintiffs.

*A. S. Scott*, for defendants.

SMITH, J. By General Statutes, chapter 49, section 5, the surplus capital on hand of banking institutions is made liable to taxation, and, by chapter 50, section 4, it is made subject to taxation in the towns wherein such banking institutions are located. By chapter 15, section 1, Laws of 1868, all shares of the capital stock of banks, located in this State, whether private, State or National, are subject to be taxed at their *par value* to the owners thereof in the town in which they reside, if in this State; otherwise in the town where the bank is located. Under the statutes of this State, therefore, there is no question that the plaintiffs were properly taxed. The statute is explicit, that the surplus capital shall be taxed,—and it is admitted that the plaintiffs had a surplus in excess of the amount of net profits they were required by the act of Congress to keep on hand,—if more than \$10,000. The question, then, remains, whether the above-cited statutes of this State are in conflict with the statutes of the United States.

The act of Congress establishing National banks, approved June 3, 1864 (13 Stats. at Large, 111), enacts:

“SEC. 33. That the directors of any association may, semi-annually, each year, declare a dividend of so much of the net profits of the association as

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they shall judge expedient; but each association shall, before the declaration of a dividend, carry one-tenth of its net profits of the preceding half year to its surplus fund, until the same shall amount to twenty per centum of its capital stock."

"§ 40. That the president and cashier of every such association shall cause to be kept a correct list of the names and residences of all the shareholders in the association, and the number of shares held by each, and such list shall be open to the inspection of the officers authorized to collect taxes under State authority.

"§ 41. *Provided*, that nothing in this act shall be construed to prevent all the shares in any of the said associations, held by any person, from being included in the valuation of the personalty of such person in the assessment of taxes imposed by or under State authority, at the place where such bank is located, and not elsewhere; but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State. *Provided further*, that the tax so imposed under the laws of any State, upon the shares of any of the associations authorized by this act, shall not exceed the rate imposed upon the shares of any of the banks organized under authority of the State where such association is located." "Provided, also, that nothing in this act shall exempt the real estate of associations from either State, county or municipal taxes to the same extent, according to its value, as other real estate is taxed."

The supplementary act of Congress, approved February 10, 1868, defines the word "place," as used in the original act, to mean "State," and provides that "the Legislature of each State may determine and direct the *manner* and *place* of taxing all the shares of National banks located within said State subject to the restriction that the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State."

Provision is thus made by Congress by which the *shares* of the stockholders in National banking associations may be taxed by authority of the States in which banks are located. No restriction is placed upon the amount of the tax that may be assessed, except that the rate shall not exceed that imposed upon similar institutions created by State authority, while the *manner* and *place* of taxing such shares is left to be determined exclusively by State legislation. Accordingly, in some States the tax is levied upon the bank itself at a certain rate per share of one hundred dollars, which has been held constitutional (*National Bank v. Commonwealth*, 9 Wall. 353 [*ante*, p. 34]), the bank being regarded as the vehicle or conduit through which the taxes of the several stockholders are collected. In

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other States the tax is assessed to the stockholder upon the *market* value of his share, by which mode the owner is taxed, indirectly, for his proportionate share of the surplus of the bank, including that part of the surplus which the bank is required to set apart whenever it declares a dividend, until the amount shall equal twenty per cent of its capital stock. The Legislature of this State, however, has enacted that the owner shall be assessed only upon the *par* value of his stock, and the bank, as such, is made subject to taxation for the surplus capital. Can the Legislature thus reach indirectly what it might do directly? There is nothing in the acts of Congress that forbids it. The surplus is the exclusive property of the bank. The National government has no interest in it. It shares in none of the profits of the bank, and is responsible for none of its defaults; and it is difficult to see how the taxation of this surplus can interfere in any way with the operations of the bank as an instrument of the National government to carry its delegated powers into execution. If taxed at all, as the law of this State now stands, it must be taxed as surplus. No reason is perceived why so large a sum should escape the tax which it is as able to bear at least, as most other kinds of property. The power to tax the people and property of the several States has never been surrendered by the States to the general government. "The agencies of the Federal government are only exempted from State legislation so far as that legislation may interfere with or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle, founded alone in the necessity of securing to the United States the means of exercising its legitimate powers, into an unauthorized invasion of the rights of the States." *National Bank v. Commonwealth*, 9 Wall. 353 (*ante*, p. 34).

"These banks are subject to the laws of the States and are governed in their daily course of business far more by the laws of the State than of the Union. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debt, are all governed by State law. It is only when a State law incapacitates them from discharging their duties to the government that it becomes unconstitutional." *Id.* 362.

In *Bank v. Lamb*, 50 N. Y. 95; S. C., 10 Am. Rep. 438, it is said: "In so far as their private business and contracts are con-

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cerned, the act does not assume to place them upon any different footing from natural persons selected by the government for the performance of some special public function, and at the same time carry on a private business on their own account. In so far as the right to carry on their private business is essential to enable them to perform any public function authorized by the Constitution, such right is doubtless protected from State interference or State prohibition. But no public charter, or privilege of immunity from State laws in respect of their private dealings, appears to have been conferred on them."

Again, on page 104: "These banks are created on the theory that there are agents of the government for the accomplishment of certain purposes authorized by the Constitution; that, to enable them to perform their functions, it is necessary that they should have the power of transacting within the States a general banking business on their own account. It is only upon the theory that this power of transacting banking business is essential to enable them to perform their functions for the government that the granting of such a power by Congress can be sustained. The power to create a corporation as an appropriate instrument for the execution of a constitutional power does not carry with it authority to confer upon that corporation unlimited privileges or immunities from State law, but only such as are necessary to enable it to effect the legitimate National objects for which it is created."

Congress, in the title to the act of 1864, expressed the leading object of the establishment of these banks to be, "to provide a National currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof." An important particular in which they differ from banks created by authority of this State is, that they are required to deposit with the Treasurer of the United States a certain amount of United States bonds, upon which they receive bills or notes to an amount not exceeding 90 per cent of the par value of the bonds deposited, which they may circulate as currency for their own benefit. "Their principal office seems to be to act as vehicles for the issue of a currency based upon the credit of the government. But the government has no concern with their business operations. The currency they issue is protected wholly independently of the result of these." *Bank v. Lamb, supra*, 95, 98. The accumulation of a surplus in excess of the amount required by statute is a voluntary matter on

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the part of the bank. It is neither forbidden nor required by the statute. Its net earnings in excess of the amount required to be set aside as a surplus fund may be divided among the stockholders. If so divided, it of course becomes the absolute property of the stockholders, but until so divided their interest in the same is only contingent, but the fund, while undivided, tends to increase the market value of their shares. The neglect to divide the net earnings to the extent allowed by law can in no way defeat or obstruct or affect the object which the government had in view in the establishment of these banks. The only effect of the neglect to divide such earnings is to increase the strength and efficiency of the bank, and thereby more certainly accomplish the object of its establishment. The surplus, to the extent above named, being then a matter wholly outside the requirements of the statute, and in no way impairing or defeating the object of establishing such agencies of the National government, but having, on the contrary, rather the opposite effect, and the surplus being the exclusive property of the bank, subject to its unrestricted control, I see no reason why the State in the exercise of a power which it never surrendered to the National government, to wit, that of taxing the polls and estates within its limits, cannot provide for the taxation of the surplus earnings of the National banks located within its borders to the extent above named. It is only doing directly what it has undoubtedly the right to do indirectly, as has before been remarked, if it should see fit to enact that the shares of such banks should be taxed at their market instead of at their par value.

In *National Bank v. Commonwealth*, 9 Wall. 353 (*ante*, p. 34), it was held that the doctrine which exempts the instrumentalities of the Federal government from the influence of State legislation is not founded on any express provision of the Constitution, but in the implied necessity for the use of such instruments by the Federal government; and that such doctrine is, therefore, limited by the principle that State legislation, which does not impair the usefulness or capability of such instruments to serve that government, is not within the rule of prohibition.

In *Thomson v. Pacific Railroad*, 9 Wall. 579, Mr. Chief Justice CHASE remarks as follows: "We fully recognize the soundness of the doctrine that no State has a 'right to tax the means employed by the government of the Union for the execution of its powers.'" But we think there is a clear distinction between the means em-

ployed by the government, and the property of agents employed by the government. Taxation of the agency is taxation of the means; taxation of the property of the agent is not always or generally taxation of the means.

“No one questions that the power to tax all property, business, and persons, within their respective limits, is original in the States, and has never been surrendered. It cannot be so used, indeed, as to defeat or hinder the operations of the National government; but it will be safe to conclude, in general, in reference to persons and State corporations employed in government service, that when Congress has not interposed to protect their property from State taxation, such taxation is not obnoxious to that objection.” *Lane County v. Oregon*, 7 Wall. 77.

In *Railroad Company v. Peniston*, 18 Wall. 5, it is said: “It may, therefore, be considered as settled, that no constitutional implications prohibit a State tax upon the property of an agent of the government, merely because it is the property of such an agent. A contrary doctrine would greatly embarrass the States in the collection of their necessary revenue, without any corresponding advantage to the United States. A very large proportion of the property within the States is employed in execution of the powers of the government. It belongs to governmental agents, and it is not only used, but it is necessary for their agencies. United States mails, troops, and munitions of war are carried upon almost every railroad. Telegraph lines are employed in the National service. So are steamboats, barges, stage-coaches, foundries, shipyards, and multitudes of manufacturing establishments. They are the property of natural persons, or of corporations, who are instruments or agents of the general government, and they are the hands by which the objects of the government are attained. Were they exempt from liability to contribute to the revenue of the States, it is manifest the State governments would be paralyzed. While it is of the utmost importance that all the powers vested by the Constitution of the United States in the general government should be preserved in full efficiency, and while recent events have called for the most unembarrassed exercise of many of those powers, it has never been decided that State taxation of such property is impliedly prohibited.”

It seems to me to be abundantly settled, both upon authority and principle, that the States, under the existing legislation by Con-



gress, have the unquestionable right to tax the surplus earnings of National banks within their limits, to the extent attempted in the case now before us. The services which these banks render to the government are only an incident to their general business. Their operations are only accidentally, not incidentally, connected with those of the government. Their efficiency to discharge their duties is not impaired by the taxation complained of ; their property only, and not their operations, is subjected to taxation ; and it is eminently just and reasonable that these institutions should bear their proportion of a common burden, in order that the State may throw around these institutions, as well as all others, and around all its subjects protection to life and property.

CUSHING, C. J. Those portions of the statutes of the United States and of this State, which are involved in this case, are sufficiently cited in the opinion of my brother SMITH, and it is, therefore, unnecessary to cite them again.

Are these provisions in the law of the United States and in the law of the State in conflict with each other ; and are they so in conflict that the law of New Hampshire cannot be enforced ?

It is conceded in this case that the par value of the shares is much less than their actual value. What might be the construction if there were no surplus, and the shares were below par, is not now necessary to be considered.

The Legislature of New Hampshire has, for reasons satisfactory to those whom it represents, provided that a certain portion of banking capital shall be taxed to the stockholders in the towns where they live, and a certain other portion in the towns where the banks are located. It is probable that there are satisfactory reasons why this should be so. It seems reasonable that banking corporations should contribute something toward the expenses of those towns of whose institutions and governmental arrangements, police and otherwise, they have the benefit. This might be effected by taxing the shares at their par value to the owners in the towns where they reside, and the excess over the par value of each share due to the surplus capital proposed to be taxed, to the owners in the towns where the banks are located. This would be exactly within the terms of the United States statute, and would be, as it seems to me, entirely unobjectionable. If, now, it were further provided that this tax on these shares should be paid by the bank, and

charged to each shareholder's account, this would obviously be a very great convenience, would be entirely consistent with the law, and, I think, could not in any way be objected to. *National Bank v. Commonwealth*, 9 Wall. 353 (*ante*, p. 34).

Now, the surplus capital proposed to be taxed is precisely the aggregate of the values above par of all the shares due to that surplus, and the dividends payable to each stockholder are precisely the profits not reserved divided by the whole number of shares. If, then, the surplus capital is taxed in one sum to the bank, and paid by the bank out of its profits, precisely the same result would be produced, excepting in a more convenient and less expensive form. All the shares would be taxed exactly as before, each share would bear the same sum, the same amount would be taken out of the fund for division, and each shareholder's dividend would be diminished by the exact amount of his tax. Identically the same result would be produced as if the statute had been more literally followed, the only difference being that in this mode the shares are taxed to all the shareholders by the name of their association.

In this nutshell lies the whole question. The result produced by this mode of taxation is demonstrably exactly the same. Can the State do, in this slightly indirect mode, what it is conceded they may do directly? It appears to me that the objection is untenable, and a very poor kind of word-catching.

It may also be remarked that, in so far as the objection founded on any supposed interference with a government agent is concerned, it cannot possibly make any difference whether any surplus capital should be taxed to each shareholder by increasing the appraisal of his stock, or to the shareholders all together by their corporate name. The statute expressly authorizes doing it in the first mode.

The Supreme Court of the United States is, of course, the tribunal of last resort. I know of no case which has yet been decided, involving the exact point presented by this case. As at present advised, I find no difficulty in agreeing to the results which the court has reached.

LADD, J. I am also of opinion that the statute under which this tax was assessed is not in conflict with the Constitution or any law of the United States. The property upon which it was laid consists of the earnings and income of shares in a National bank, which the bank voluntarily reserved in excess of the surplus

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required to be kept on hand by the act of Congress. It was not capital of the bank, within the meaning of the laws of the United States, as interpreted and applied by the Supreme Court in repeated decisions since the passage of the act under which the bank was established, but simply a fund which the bank might legally have divided and paid over to the owners of its stock, in the way of dividends, but which it chose rather to retain for the purpose of enlarging and facilitating the transaction of its business. It was tangible property, situated within our territorial limits, entitled, as much as the property of any other citizen, to the full protection of our municipal laws; and it is not easy to imagine any just reason why it should not be charged with its due and equal proportion of the burden of maintaining and administering those laws.

It has not, indeed, been claimed by counsel for the bank that this surplus is not in some form a legal and proper object of State taxation. But the objection is, that the mode in which the Legislature have undertaken to reach it is not warranted by the Constitution, or authorized by the act of Congress under which the bank was established; that it should have been levied by the name of a tax upon shares instead of a tax against the bank by name; that the true construction of the Constitution and act of Congress forbids a State tax of any kind, except upon real estate, to be assessed against a bank created by act of Congress, is an agent in the administration of the National finances.

It seems to me, such a construction can only be sustained by sticking very closely to somewhat narrow interpretation of the letter of the act, and disregarding altogether the spirit and purpose of both the act and the Constitution of the United States. The broad reason, upon which it was held, in *McCulloch v. Maryland*, 4 Wheat. 316, that State governments have no right to tax any of the constitutional means employed by the government of the Union to execute its constitutional powers any further than such right may be given by the act creating the agency, and so that a State, within which a branch of the bank of the United States had been established, could not, constitutionally, tax that branch, was said by Chief Justice MARSHALL to rest upon three very plain abstract propositions: (1) That a power to create implies a power to preserve; (2) that a power to destroy, if wielded by a different hand, is hostile to and incompatible with these powers to create and pre-

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serve; (3) that where this repugnancy exists, that authority which is supreme must control, not yield to that over which it is supreme. The power of Congress to create and continue a bank having been established in a preceding part of the opinion, he remarks that it is too obvious to be denied that the power of taxing it by the States may be exercised so as to destroy it; hence the conclusion that such power to tax does not exist in the States.

In the present case the Legislature have left untouched the capital of the association, nor has there been any attempt to tax that portion of the earnings of its shares which the bank was required to set aside as a surplus for the greater security both of the government and the people. It is perfectly obvious that the levying of this tax does not touch the institution at any point where it is shielded from State taxation by the reasons upon which *McCulloch v. Maryland*, and the numerous cases following it, are placed. It is not taxing an instrument or agent of the government for property which, by the act creating it, is in any way made part of the plan of its existence, or the basis of its operations.

But it is argued that the case of *Van Allen v. The Assessors*, 3 Wall. 573 (*ante*, p. 1), establishes the doctrine, that although this property was legally subject to taxation by the State, still, inasmuch as the Legislature have directed it to be assessed against the bank instead of the stockholders individually, our statute must be held void as being repugnant to the law of Congress which allows the shares only to be taxed. I do not think the case goes that length. The main question there discussed was, whether the shares of a National bank could be taxed at all by State authority, except for what remained of their value after deducting the National securities in which part or the whole of the capital of such bank was invested; and it was held that they might be thus taxed. It was further held, that a statute of the State of New York laying a tax upon shares in such banks, which contained no provision that such tax should not exceed the tax upon shares in State banks, could not be upheld. If there were any doubt, however, as to the doctrine of that case, it certainly seems to be quite removed by the latter case of *National Bank v. Commonwealth*, 9 Wall. 353 (*ante*, p. 34); and, as this case seems to me decisive of the present, it will be necessary to examine it somewhat at length.

It was error to the Court of Appeals of Kentucky. A statute of that State lays a tax as follows: "On bank stock, or stock in any

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moneyed corporation of loan or discount, fifty cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations or societies." And the same statute goes on to enact: "The cashier of a bank whose stock is taxed shall, on the first day of July in each year, pay into the treasury the amount of tax due. If such tax be not paid, the cashier and his sureties shall be liable for the same, and twenty per cent upon the amount; and the said bank or corporation shall thereby forfeit the privileges of its charter."

Acting under this statute, the Commonwealth demanded of the plaintiffs in error—the First National Bank of Louisville—\$4,000 with interest, the sum which a tax of fifty cents per share on the shares of the bank gave.

There was judgment against the bank in the State court, and that judgment was here affirmed.

In argument, it was strenuously urged by counsel for the bank that the State had no legal or constitutional power to coerce the bank itself to pay the tax *in solido* for its stockholders; that to prevent these organizations from being made the servants and agents of the States in the collection of taxes, thus clothing the State with an authority not justified by the Constitution, Congress had particularly prescribed the *mode* of collection, as well as the extent of it.

Mr. Justice MILLER delivered the unanimous judgment of the court, in the course of which he says:

"It is strongly urged that it is to be deemed a tax on the capital of the bank, because the law requires the officers of the bank to pay this tax on the shares of its stockholders. Whether the State has the right to do this we will presently consider, but the fact that it has attempted to do it does not prove that the tax is any thing else than a tax on these shares. It has been the practice of many of the States for a long time to require of its corporations thus to pay the tax levied on their shareholders. It is the common if not the only mode of doing this in all the New England States; and in several of them the portion of this tax, which should properly go as the shareholders' contribution to local or municipal taxation, is thus collected by the State, of the bank, and paid over to the local municipal authorities. \* \* \* But it is argued that the banks, being instrumentalities of the Federal government, by which some of its important operations are conducted, cannot be subjected to

such State legislation. \* \* \* The most important agents of the Federal government are its officers; but no one will contend that when a man becomes an officer of the government he ceases to be subject to the laws of the State. The principle we are discussing has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the Federal government are only exempted from State legislation so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government. Any other rule would convert a principle, founded alone in securing to the government of the United States the means of exercising its legitimate powers, into an unauthorized and unjustifiable invasion of the rights of the States. The salary of a Federal officer may not be taxed; he may be exempted from any personal service which interferes with the discharge of his official duties, because those exemptions are essential to enable him to perform those duties. But he is subject to all the laws of the State which affect his family or social relations, or his property, and he is liable to punishment for crime, though that punishment be imprisonment or death. So of the banks. They are subject to the laws of the State, and are governed in their daily course of business far more by the laws of the State than of the Nation. All their contracts are governed and construed by State laws. Their acquisition and transfer of property, their right to collect their debts, and their liability to be sued for debts, are all based on State law. It is only when the State law incapacitates the banks from discharging their duties to the government that it becomes unconstitutional. \* \* \*

“A very nice criticism of the proviso to the 41st section of the National Bank Act, which permits the States to tax the shares of such bank, is made to us to show that the tax must be collected of the shareholder directly, and that the mode we have been considering is by implication forbidden. But we are of opinion that, while Congress intended to limit State taxation to the shares of the bank, as distinguished from its capital, and to provide against a discrimination in taxing such bank shares unfavorable to them, as compared with the shares of other corporations and with other moneyed capital, it did not intend to prescribe to the States the mode in which the tax should be collected. The mode under consideration is the one which Congress itself has adopted in collecting its tax on

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dividends, and on the income arising from bonds of corporations. It is the only mode which, certainly and without loss, secures the payment of the tax on all the shares, resident or non-resident; and, as we have already stated it, it is the mode which experience has justified in New England States as the most convenient and proper, in regard to the numerous wealthy corporations of those States. It is not to be readily inferred, therefore, that Congress intended to prohibit this mode of collecting a tax which they expressly permitted the States to levy."

Now let us see how this reasoning applies to the case before us. By section 1, chapter 15, Laws of 1868, "all shares of the capital stock of the banks located in this State, whether private, State, or National, shall be taxed at their par value to the owners thereof, in the town in which they reside, if in this State," etc. By section 4, chapter 50, General Statutes, an act which had been in force for many years in this State when the National Bank Act was passed, "the surplus capital on hand in banking institutions shall be taxed in the towns wherein such banking institutions are located;" and to prevent the possibility of wrong from thus separating what might perhaps well enough be treated as a single interest, it is expressly provided that "no statute provisions shall be so construed as to subject any stock to double taxation." Gen. Stats., ch. 49, § 7.

It is not pretended that there is any double taxation here, nor is it claimed but that this surplus voluntarily reserved by the bank beyond what it is required by the act of Congress to retain, enhances the value of the shares just as directly as though it were actually divided and added to the shares by some act of the bank. That is, the shares represent the interest of their owners in this surplus, just as much as they do the interest of the shareholders in the capital stock and property of the bank, which is made exempt from State taxation by the Federal law. To continue, so far as might be consistent with the full operation of the new system, established by the National Legislature, a mode of taxation to which our people from long use had become accustomed, and thus provide that the great change made in the currency of the country by the National Bank Act should go into effect with as little friction as possible, our Legislature did not change the law of the State in this regard, but still continued to towns in which a bank may be situated the right to tax this surplus as property located within their corporate limits, instead of treating the surplus as an

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increment to the shares, which it really is, and dividing the tax upon it among the various towns where the shares are owned. Most clearly it is a tax upon value, represented by the shares. In substance, it is a tax upon the shares and nothing else. The only difference is, that by our statute it is to be paid out of funds, the beneficial ownership of which is in the shareholders, by the hand of the bank, whereas, if it were assessed upon the shareholders individually, it would be paid by them directly without the intervention of the bank. The legal title to the money may be in the corporation until it is divided and handed over to the stockholders, but this legal ownership is of no higher character than that of a trustee for the owners of the shares; and, in reality, it is only by consent of the shareowners that the surplus is not distributed to them.

In *National Bank v. Commonwealth* it was held, as we have seen, that a tax upon shares might legally be levied directly against the bank. Is it to be held that a tax, which is in fact and to all practical intents upon shares, cannot be levied against the bank, merely because the Legislature call it by another name, and assess it upon a surplus always definite and easy to be ascertained? I think not. See *Thomson v. Pacific Railroad*, 9 Wall. 579; *Railroad Company v. Penniston*, 18 id. 5. My opinion, therefore, is, that the case is entirely within the doctrine of *National Bank v. Commonwealth*; and as this is the opinion of all the members of the court, the

*Petition must be dismissed.*

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STATE, NORTH WARD NATIONAL BANK OF NEWARK, PROSECUTOR,  
v. CITY OF NEWARK.

(10 Vroom. 380.)

*Taxation of surplus — National bank stock — How taxed in New Jersey.*

The undivided surplus of a National bank — if not invested in Federal securities — may be taxed against the bank, provided it is not included in assessing the value of the shares of stock in the hands of stockholders.\*

A local statute providing a special method of taxing shares of stock in National banks was rendered void by a constitutional amendment providing that "property shall be assessed for taxes under general laws and by uniform rules."

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\* See, also, *First National Bank v. Peterborough*, ante, p. 658.



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By the present law of New Jersey the stock in National banks owned by non-residents of the State is taxable in the township or ward where the bank is situated, and that owned by residents of the State is taxable in the township or ward where the owners respectively reside.

The restriction on the power of the States in the matter of taxation of National banks does not arise from the fact that they are created corporations under an act of Congress. The States may lawfully tax the property merely of a corporation created by act of Congress, in common with other property of the same description throughout the State. But to the extent that such property is invested in the securities of the Federal government, it is beyond the power of the States to tax it against the corporation, without permission of Congress, for the reason that taxation, in that respect, would be indirectly a tax upon the credit and securities of the Federal government.

**O**N *certiorari*. The following state of the case was agreed upon by the counsel of the respective parties.

The North Ward National Bank of Newark, the prosecutor, is a banking association, organized under the act of Congress of the United States, having its banking-house in the city of Newark, in the county of Essex, in the State of New Jersey.

The capital of the said banking association is the sum of \$250,000, and its surplus the sum of \$11,000.

The stock is largely held by persons who do not reside in the city of Newark, or county of Essex, and a true list of the said stockholders, and their respective places of residence at the time of the tax assessment complained of, are contained in the return made by the defendant to the writ of *certiorari*.

The said banking association is assessed by the municipal authorities of the city of Newark on the whole amount of its capital stock and surplus, under and by virtue of an act of the Legislature of New Jersey, entitled "A supplement to the act entitled 'An act relating to the assessment and revision of taxes in the city of Newark, approved March fifteenth, one thousand eight hundred and sixty-six,'" approved April 4th, 1872.

Argued at February Term, 1877, before Justices DEPUE, VAN SYCKEL and SCUDDER.

*Joseph Coult*, for plaintiff in *certiorari*.

*Henry Young*, for defendant.

DEPUE, J. The restrictions on the power of the States in the

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matter of taxation of National banks do not arise from the fact that they are created corporations under an act of Congress. The exemption of a corporation, created as one of the agencies of the Federal government, from taxation by the States, is dependent not upon the nature of the agent, nor upon the mode of its constitution, but upon the effect of the tax; whether the tax does, in truth, deprive it of the power to serve the government as it was intended to serve it, or hinder the efficient exercise of its powers. A tax upon the property merely of such a corporation, having no such necessary effect, may be rightfully laid by the States. *Railroad Company v. Peniston*, 18 Wall. 5.

The moneyed capital of a bank is an entirely different thing from its capital stock. The former is the property of the corporation. It may consist of cash or of bills discounted, or be in part invested in real estate, or in the securities of the Federal government. In whatever form it is invested, it is owned by the bank as a corporate entity, and not by the stockholders. The stock or shares represent the interests of the shareholders, which entitle them to participate in the net profits of the bank in the employment of its capital, and is a distinct and independent interest or property in the shareholders, held by them like other property. To the extent that the capital is invested in the securities of the Federal government, it is beyond the power of the States to tax it as against the corporation, for the reason that taxation in that instance would be indirectly a tax upon the credit and securities of the government. This distinction between the capital of a bank and its stock is pointed out by Mr. Justice MILLER in *National Bank v. Commonwealth*, 9 Wall. 353 (*ante*, p. 34), and by Mr. Justice NELSON in *Van Allen v. Assessors*, 3 id. 573 (*ante*, p. 1), as one that has been adopted by the Supreme Court of the United States in adjudicating upon the power of the States in the taxation of National banks. In *McCulloch v. Maryland*, 4 Wheat. 316, it was held that the Bank of the United States, which was incorporated by act of Congress, was taxable by the State of Maryland on lands which were the property of the bank, in common with other real property in the State, and that citizens of the State might also be taxed on the interest which they held in the bank, in common with other property of the same description throughout the State. The distinction is between taxation of a corporation created by or employed by the Federal government, and taxation of the instrumentalities

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or means of the government in the possession of such corporation. The States may tax banking institutions, but they cannot tax the currency or government bonds belonging to such banks. *Western Union Telegraph Co. v. City of Richmond*, 3 Am. Law Times (N. S.) Rep. 149; 26 Gratt. The cases are cited and commented on by Mr. Justice STRONG, in *Railroad Company v. Penniston*, *supra*, and by the court in *Western Union Telegraph Co. v. City of Richmond*. They fully establish the doctrine that the property merely of a corporation, created by act of Congress, may be taxed by the States, provided such taxation be not indirectly a tax upon the credit and securities of the Federal government. That this principle will apply to the undivided surplus of a National bank and to other investments of its capital, if the same be not invested in the securities of the Federal government, is apparent from the cases above cited. The States possess an inherent power of taxation of such property independently of any grant of authority by Congress.

The power of the States to tax, in the hands of stockholders, the stock of National banks, which is invested in Federal securities, rests upon different grounds. The States have no inherent powers of taxation in that respect. Whatever powers they have of taxation in that form is derived exclusively from the authority conferred by Congress. By the act of Congress of June 3, 1864 (2 Bright. Dig. 60, § 41), as amended by the act of February 10, 1868 (U. S. Stat. p. 34), the States were empowered to tax the shares of stock of National banks by including them in the valuation of the personal property of the owners in the assessment of taxes. The only restriction on this power of taxation is, that taxation thereon shall not be at any greater rate than is assessed on other moneyed capital in the hands of individual citizens of the State, and that shares owned by non-residents of the State shall be taxed in the city or town where the bank is located. In every other respect the power of the States to impose the tax is unrestrained. It may be laid on the stock, although the capital of the bank is invested in Federal securities (*National Bank v. Commonwealth*, 9 Wall. 573 [*ante*, p. 34] ); and be assessed for purposes of taxation at an amount above its par value, if such valuation is made by the State law on other moneyed capital in the assessment of taxes (*Hepburn v. School Directors*, 23 Wall. 480 [*ante*, p. 109] ); and be separated from the person of the owner, and given a *situs* of its own for the purposes of taxation. *Tappen v. Merchants' National Bank*, 19 Wall. 490 (*ante*, p. 100). The

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mode in which the tax shall be assessed and collected, and the place where it shall be laid upon resident stockholders, are left to the discretion of the Legislature of the State in which the banks are respectively located. We must look, therefore, to our own Constitution and laws to ascertain whether the assessment in controversy was legally made.

The Legislature of this State, by the 16th section of the general tax law of April 11th, 1866 (Nix. Dig. 954), provided that the stock of National and State banks should be taxed to stockholders in the township or ward wherein the bank is located, and it was made the duty of the bank to retain and pay the amount of the tax out of dividends from time to time declared, and such tax was made a lien on the shares of the stock, and the same were made liable to be sold by virtue of a tax-warrant against the person taxed, as in other cases. By the act of April 1st, 1869 (Acts, 1869, p. 1149), stockholders resident in the State were required to be taxed for the stock of National banks in the townships or wards in which they respectively resided, and the bank was to be assessed for stock owned or held by non-residents of this State. In these particulars only, the act of 1866 was altered by the act of 1869. By force of these two acts, the mode of taxing the stock of National banks was this: stockholders, resident in this State, should be taxed therefor in the township or ward where they reside, respectively, and the assessment on the stock of non-resident stockholders should be made in the township or ward where the bank is located, and, in form, against the bank, the tax being a lien on the stock, and payable out of the dividends thereon, at least so far as it was laid for stock owned or held by stockholders residing out of the State. This system of taxation of the stock of National banks, by force of these two acts, became the general law on the subject, in force throughout the State.

In 1872, by a supplement to "An act relating to the assessment and revision of taxation in the city of Newark" (Acts, 1872, p. 1165), the 16th and 17th sections of the act of April 11th, 1866, were "declared to be in full force and effect, so far as relates to the city of Newark." Upon the idea that, in this obscure way, the 16th section of the act of 1866 was revived and re-enacted, without regard to the alterations of it by the act of 1869, as a local and special law in force in the city of Newark, the assessment in question was made. It was made against the bank on its surplus of

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\$11,000, which was held by the bank, and does not appear to have been invested in government securities, and also upon its entire capital stock of \$250,000, which was owned by persons residing in the city of Newark and elsewhere in the State of New Jersey, and by stockholders non-residents of this State.

The objection of the prosecutor, that the tax is assessed against the bank, and not to the individual stockholders, should not, under the circumstances, be allowed to prevail. It is purely a formal objection, and is not specifically taken in the reasons assigned. Undoubtedly, a strict adherence to the words of the act of Congress would require the assessment to be directly against the individual stockholders. To such an assessment, it would be competent for the Legislature to annex a lien on the stock, with a power to sell in satisfaction of the tax of the delinquent stockholders. This, in substance, so far as the interests of the bank are involved, is the effect of this assessment. The tax can only be collected out of the dividends. In *National Bank v. Commonwealth*, 9 Wall. 353 (*ante*, p. 34), and *Lionberger v. Rouse*, id. 468-477 (*ante*, p. 41), the assessments were in form against the bank, and were sustained by the court. While the 16th section of the act of 1866 was in force — the tax on all the stockholders being laid at the place where the bank was located, and paid by the bank — it was the universal custom, adopted for the convenience of all parties, to make the assessment in form against the bank, instead of individual stockholders, and to pay it out of the general funds of the bank, instead of charging the several amounts to the accounts of individual stockholders. Since 1872, this custom has been continued in the city of Newark, for the same reasons of convenience. Without any application having been made to the commissioners of taxation to change the form of the assessment, and transfer it from the bank to individual stockholders, it would be unjust to the public to allow the objection to the form of the assessment to be taken, where no reason presenting the precise ground of exception to the tax has been filed.

The other objection presents the material question in the cause. It is, that the act of 1872, as a local and special act on the subject of taxation, became inoperative by the adoption of Paragraph 12 of the Constitution of this State, as amended in 1875. That paragraph is as follows: "Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value."

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It was contended by the city counsel that it is a fundamental rule of construction, of universal application, that constitutional provisions will have operation only prospectively. If by this proposition be meant merely that a new constitutional amendment will be inoperative to make null transactions past and done under a pre-existing law, which were valid when the transactions took place, the position is conceded to the fullest extent. The destruction of vested rights, whether by a statute or constitutional amendment, by implication, will never be presumed. *Osborne v. Nicholson*, 13 Wall. 654. But the argument does not touch the point of this case. For instance, an assessment of taxes made under an existing law, which was repealed after the assessment, but before its collection, is a thing passed and completed, and is unaffected by such repeal. *Town of Belvidere v. Warren R. R. Co.*, 5 Vroom, 193; S. C. *in error*, 6 id. 584. So, also, a conviction and sentence, under a statute in force when judgment is pronounced, will not be vacated, or the term of imprisonment terminated by a subsequent repeal of the statute. But in taxation from year to year, each successive act of taxation is a separate and distinct thing, appealing to a law in force when the tax is laid, to support the imposition.

Nor can it be questioned that a constitutional provision will operate, *proprio vigore*, to repeal existing statutes, if such be the intention of the framers of the instrument. In *People v. Supervisors of Westchester*, 12 Barb. 446, a constitutional amendment, "that when private property shall be taken for public use, the compensation to be made therefor, when such compensation is not made by the State, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law," was held to abrogate a prior statute providing for a different mode of assessment of the damages. In *Pierce v. Delamater*, 1 Comst. 17, a statute which disqualified a judge of the Court of Appeals from taking part in the decision of a cause or matter which was determined by him when sitting as a judge in any other court, was held to be abrogated by a constitutional provision subsequently adopted, which prescribed the qualifications of the members of the court, and did not disqualify for that reason. In *St. Joseph Board of Public Works v. Patten*, 62 Mo. 444, it was held that a constitutional provision that taxation for school purposes should not exceed forty cents on the \$100, executed itself; that it required no legislation to enforce it, and therefore went

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into effect on the adoption of the Constitution. The fifteenth amendment of the Constitution of the United States invested the citizens of the United States with the right of exemption from discrimination in the exercise of the elective franchise, on account of race, color, or previous condition of servitude. It was so held by the Supreme Court of the United States, in *United States v. Reeve*, 92 U. S. (2 Otto) 215. Congress was, by the same amendment, empowered to enforce that right by appropriate legislation, that the right conferred might be more effectually protected; but practically, the word "white," used in the Constitution of this State in designating the persons entitled to suffrage, was eliminated from that instrument by this amendment, although it was not in fact expunged until the amendment of the State Constitution in 1875. Other instances of the self-executing quality of constitutional amendments, abrogating prior institutions, laws and Constitutions, and becoming *proprio vigore*, the supreme law, without legislative aid, will be found in the following cases: *Permoli v. First Municipality*, 3 How. (U. S.) 589; *Ochiltree v. The Railroad Company*, 21 Wall. 249; *In matter of Oliver Lee & Co.'s Bank*, 21 N. Y. 9. In *Groves v. Slaughter*, 15 Pet. 449, the court held that an article in the Constitution of the State of Mississippi, that "The introduction of slaves into this State as merchandise, for sale, shall be prohibited from and after the 1st day of May, 1833," was not operative as a law of prohibition. This decision was reaffirmed in *Rowan v. Runnels*, 5 How. 134, although, in the meantime, the courts of Mississippi had decided otherwise. The decision in the Supreme Court of the United States was put upon the peculiar language of the enacting part of the article—"shall be prohibited"—which they construed to be a command addressed to the Legislature to do a certain act, and also on the ground that legislative action was indispensable to carry into effect the object of the prohibition.

The effect of a constitutional amendment on existing laws is a question of intent. The inquiry is whether the particular provision is one that is capable of self-execution, and was so intended by its framers, or whether legislative action was needed to give it effect, or its operation was designed to be on future Legislatures, either to enlarge their powers or restrict them.

Of the constitutional amendments of 1875, the paragraphs which were directed to be inserted in the then existing Constitu-

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tion, as paragraphs 11 and 12, are illustrations of two of these classes of constitutional provisions.

Paragraph 11 is as follows: "The Legislature shall not pass private, local or special laws in any of the following enumerated cases, that is to say, laying out, opening, altering, and working roads or highways; vacating any road, town plot, street, alley, or public grounds; regulating the internal affairs of towns and counties; appointing local offices or commissions to regulate municipal affairs; selecting, drawing, summoning, or empaneling grand or petit jurors; creating, increasing, or decreasing the percentage or allowance of public officers during the term for which said officers were elected or appointed; changing the law of descent; granting to any corporation, association, or individual any exclusive privilege, immunity, or franchise whatever; granting to any corporation, association, or individual the right to lay down railroad tracks; providing for changes of venue in civil or criminal cases; providing for the management and support of free public schools. The Legislature shall pass general laws providing for the cases enumerated in this paragraph, and for all other cases which, in its judgment, may be provided for by general laws. The Legislature shall pass no special act conferring corporate powers, but they shall pass general laws under which corporations may be organized and corporate powers of every nature obtained, subject, nevertheless, to repeal or alteration, at the will of the Legislature."

This paragraph is plainly operative only on future legislation. It prohibits, in the future, the adoption of any local or special legislation on the enumerated subjects, and enjoins the passage of general laws on such subjects. Its prohibition is laid on, and its commands addressed to, subsequent legislatures only. Its effect is upon what the Legislature may do in the future, and not upon what has been done by it in the past.

Then follows paragraph 12: "Property shall be assessed for taxes under general laws, and by uniform rules, according to its true value." The change in the language of this command from that in the preceding paragraph is significant, inasmuch as the two paragraphs follow in immediate succession. The mandate is not, as it is in the preceding paragraph, addressed to the Legislature. It would have been easy and quite natural for the framers of the constitutional amendments to have added the subject of this paragraph to the preceding one, and have enjoined the passage by



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the Legislature of general laws on this subject also, if it had been the intention of the authors of the amendments to leave the execution of the policy in this paragraph established to the Legislature in its discretion. But the framers of the amendments determined otherwise. They declared that "property should be assessed" — which is a new and distinct process every time taxation is made — "under general laws."

At the time these constitutional amendments were drafted by the commissioners, and were voted on by the people, general laws for the assessment of property for taxes were in force, fulfilling completely the requirements of this paragraph. The act of 1866 (Nix. Dig. 951), under which taxes were assessed generally in the State, was a law that, in all respects, fulfilled the new constitutional requirements as to the valuation of property for the purposes of taxation. As amended by the act of 1869, which classified shares of National banks with other personal property of citizens of the State, a general law, in the usual acceptation of that term, was then in force in the State, which provided for assessing the property on which the present tax is laid at its true value. These laws not being inconsistent with the constitutional amendment, continued to be applicable to taxation after the amendment went into effect. *Hill v. Hunt*, Spenc. 476. In the then condition of the tax laws, no new legislation was indispensable to carry into effect the policy established in the adoption of this amendment. To accomplish the result which was intended, nothing more was necessary than the abrogation of special and local laws on the subject, which were inconsistent with the existing general law. To effect that result, a repealer, by express words, was not necessary. Where it clearly appears that it was the intention of the law-making power to prescribe a uniform rule, which shall be the only rule applicable to the entire subject, all laws inconsistent therewith are repealed, without the use of express words of repeal. *Industrial School v. Whitehead*, 2 Beas. 290; *State v. Comm'rs of R. R. Taxation*, 8 Vroom, 228; S. C., 9 id. 472. That it was intended by this amendment to establish a uniform rule, which should be the only rule for assessing property, is so plainly manifested in the language used as to admit of no doubt.

With a general tax law in existence, conforming in every particular to the constitutional requirements, it would have been use-

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less to require the Legislature to re-enact its provisions. There being no power to coerce the legislative department to enact laws, to have left the execution of the policy on which the paragraph was founded to depend on legislative action, might have defeated, or, at least, delayed the consummation of the plan of taxation devised by the framers of the amendments. To reach a result so easily attainable, and secure, beyond a peradventure, the proposed end, the commission commanded that property should be assessed under general laws, and by a necessary implication interdicted assessments for taxes thereafter under special laws.

Nor should the circumstances connected with the adoption of the constitutional amendments of 1875 be overlooked in the search after the intent of this amendment. The two grievances which, in a great measure, led to the creation of a commission to frame amendments to be proposed for adoption by the people, were the existence of a multitude of local and special laws on a variety of subjects, and the inequality of taxation arising from local and special laws. To have abrogated all special laws in existence by the proposed amendments, would have led to great confusion, and was impracticable. The commission, therefore, contented itself with a mandate to the Legislature to pass general laws on the subjects enumerated in the eleventh paragraph, and an injunction against the passage of local or special laws on such subjects in the future. No such embarrassments or difficulties were in the way of the immediate execution of the proposed scheme of taxation under general laws. General laws were then in force, adequate to accomplish the purpose, and no embarrassment or confusion could arise from the assessment of property under such laws. Consequently when the commission came to deal with taxation, they departed from the formula in which special laws were interdicted in the eleventh paragraph, and declared that property should be assessed for that purpose under general laws. It only required such a declaration to give effect at once to the will of the law-makers.

The argument so strongly urged in favor of holding this paragraph to be operative only on future legislation — that it is placed under the legislative head — ought not to be permitted to overcome the clear and unequivocal language employed. As a prohibition on future legislation at variance with the policy adopted for the present and the future, the paragraph was not inappropri-

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ately put in that place. The constitutional commission was dealing with the subject of local and special laws — conspicuous among which, in the history of past legislation, were local and special laws on the subject of taxation. In doing so, they naturally grouped together all the provisions they proposed to adopt to remove the evils arising from that class of legislation. They provided for special legislation on the enumerated subjects in the eleventh paragraph, by prohibiting it in the future, and empowering the Legislature to pass general laws thereon, and then, in a separate paragraph, made a present command, that “property shall be assessed for taxes under general laws and by uniform rules, according to its true value.”

In my judgment, the act of 1872, which was a special law for the taxation of the stock of National banks in the city of Newark, was abrogated by the twelfth paragraph of the constitutional amendment. It was not only a special law for assessing property for taxes, but also afforded a striking instance of the violation of uniformity of rule in the assessment of property for taxation, and of inequality in taxation, under special and local laws. Under its sway, the owners of the stock of National banks located elsewhere in the State, who resided in, and were taxable in, the city, were free from taxation upon their stock; and the owners of stock in banks located in the city, who resided elsewhere in the State, were subjected to double taxation — taxation in the city, under the act of 1872, and taxation at their places of residence, under the act of 1869.

Taxation of National banks in the city, after the constitutional amendments were adopted, could only be made under the act of 1866, as amended by the act of 1869. The assessment, therefore, cannot be sustained, except in so far as it is consistent with these two acts. By these acts, the stock owned by persons not residents of this State is taxable in the township or ward where the bank is located, and that owned by residents of this State is taxable in the township or ward where the owners respectively reside.

The stock owned by non-residents of the State was lawfully taxed in the ward where the banking-house is located. With respect to the stock owned by persons residing in the city of Newark, it was taxable to them in the city. It does not appear that any of such stockholders whose stock was included in the valuation did not reside in that ward. The court, therefore, will not dis-

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turb the assessment, so far as this stock is concerned. But so far as relates to the stock owned by persons residing in this State, but not in the city of Newark, the assessment is set aside. These individuals were taxable on their stock at their places of residence.

The undivided surplus, not being invested in Federal securities, might have been lawfully taxed against the bank; but the State law seems to contemplate that it be taxed in connection with the capital stock in the hands of the stockholders. It should, therefore, be taken into consideration in estimating the taxable value of the stock.

Counsel will make a calculation which will carry into effect the opinion of the court, and enter a rule accordingly.

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PEOPLE EX REL. CAGGER V. DOLAN.\*

(36 New York, 59.)

*Taxation of National bank shares — Deduction for debts in New York.*

By statute in New York, individuals were taxed on "the full value of all their personal property, after deducting the just debts owing by them." A subsequent statute provided that the owners of shares of stock in National banks situated in the State should be "taxed on the value of their shares of stock therein." *Held*, that a shareholder was not entitled to a reduction on the assessed value of his shares on account of debts.\*

**A**PPEAL from an order of the General Term of the Third District, commanding the appellants, as assessors of the city of Albany, to reduce the assessment against the relator to the sum of one dollar, in accordance with the request contained in his affidavit. The facts are stated in the opinion of the court.

*A. J. Parker*, for appellants.

*Samuel Hand*, for respondents.

HUNT, J. The relator resides in the sixth ward of the city of Albany. The National Commercial Bank, in which he owns eleven

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\* See *City National Bank v. Paducah*, ante, p. 300.

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hundred and four shares of stock, of the value of \$20 each, is located in the fourth ward of the same city. Under the act of the Legislature of this State, passed April 23, 1866, the relator was assessed \$22,800 as the par valuation of his bank shares. The defendants are the board of assessors of the city of Albany. On the 24th of September, 1866, the relator presented to the said defendants an affidavit, in which he stated "that the value of the personal estate owned by him does not exceed the sum of one dollar, after deducting his just debts, and his property invested in the stocks of corporations, liable to be taxed therefor," and claimed that the assessment should be reduced in accordance therewith to the sum of one dollar.

The defendants refused to reduce the assessment, and the relator moved at Special Term for a mandamus directing them to make such deduction. This motion was granted, and upon appeal by the defendants to the General Term of the Third District, the order was affirmed. The defendants now bring their appeal to this court.

The respondents claim that the assessment and taxation upon bank shares, authorized by the act of April 23d, 1866, stand upon the same basis as all other taxation of personal property, under the laws of this State; that the relator was entitled to deduct from such assessment his personal indebtedness, and that he was subject to taxation upon the balance only. The appellants claim that there was intended to be established a distinct system of taxation in reference to shares of bank stock, by which they were to be assessed and taxed upon their actual value, independent of the condition or circumstances of the owner.

By the General Tax Law of the State, each individual is assessable in the town or ward in which he resides, and not elsewhere, for all personal estate owned by him. Between the first days of May and July the assessors of each town are required to ascertain, by diligent inquiry, the names of the taxable inhabitants, and the, taxable property, real or personal, in their respective towns. In the fourth column of the assessment roll to be prepared by them, it is directed that the assessors shall set down "the full value of all the taxable personal property owned by such person, after deducting the just debts owing by him." 1 R. S. 391. It is the duty of the assessors to meet at a time appointed to hear complaints and make corrections of their rolls. It was at the time thus appointed that

the relator made the affidavit before set forth, and it is conceded that in regard to taxation for personal property generally, it was sufficient to entitle him to the deduction claimed.

The legislation upon the subject of the taxation of banks has been heretofore regulated upon a plan by itself, and a reference to this system will aid us in reaching a correct conclusion upon the question before us. The general system of legislation upon the subject-matter of a statute may be taken into view, to aid the construction of a particular statute relating to the same subject. (*Holbrook v. Holbrook*, 1 Pick. 248, 254; *Mendon v. Worcester*, 10 id. 241. The first statute of this State that imposed a tax upon bank stock, as such, was that of 1823 (Session Laws 1823, p. 390), which enacted "that all goods, chattels, bonds \* \* \* bank stock \* \* \* shall be subject to taxation under the meaning of this act." By section 14 the officers were required to deliver to the assessors a statement of their real estate, and the amount of their capital stock paid in or secured to be paid in, and the assessors were directed to insert in the roll "the amount of such real and personal property." It was further provided, that it should be the duty of the cashier or treasurer to pay the amount of such tax, "and to deduct the same from the dividends of the stockholders, in proportion to the amount of stock held by them respectively, except the stock held by the State or by literary or charitable institutions, from which no deductions shall be made." § 15. The companies were further authorized to commute for such taxes, by the payment of ten per cent upon the amount of their dividends or income. The imposition of this tax was made upon the recommendation of the then Comptroller of the State, and was the subject of complaint on the part of the banks. It continued, however, to be the law of the State, until the adoption of the Revised Statutes. By the Revised Statutes of 1828 it was provided that all moneyed or stock corporations, deriving an income or profit from their capital or otherwise, should be liable to taxation on their capital. 1 R. S. 414. The assessment of such corporations was made: (1) Upon the real estate owned by them, if any, and (2) upon the capital stock actually paid in, and secured to be paid in, excepting therefrom the sums paid for real estate, and the amount of such capital stock held by the State, and by any incorporated literary or charitable institutions. The safety fund banking system, which came into operation in the year 1829,

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required that the capital of all banks should be fully paid in. At this time, then, banks, as such, were taxable upon the amount of their capital stock paid in, with the two exceptions stated, to wit: of stock held by the State, and by literary or charitable institutions. It was thus taxable, whatever might be the diminished value of its shares, unless it was able to show that it was not in the receipt of any income or profits whatever. *Id.* 416. So, on the other hand, it was subject to no greater taxation, however valuable its shares might become. *Bank of Utica v. The City of Utica*, 4 Paige, 399. Its nominal capital was the standard of taxation, although its shares might be reduced below that value, or might be greatly above it.

By the act of December 7, 1847 (4 R. S. [Edmonds' ed.], 151) it was enacted that all individual bankers and all banking associations "shall be subject to taxation on the full amount of actual capital paid in, or secured to be paid in, as such capital, by them severally, at the actual market value of such securities, to be estimated by the Comptroller, without any deduction for the debts of such individual banker or banking association."

It was also enacted that taxes upon incorporated companies should be demanded from the president of the company, and that the same should "be paid out of the funds of the company, and be ratably deducted from the dividends of those stockholders whose stock was taxed, or shall be charged upon such stock, if no dividends be afterward declared." 1 R. S. (Edmonds' ed.) 377, § 18.

In the year 1853 this system was amended by providing that the assessment upon incorporated companies should be upon their real estate, upon the amount of their capital stock paid in, or secured to be paid in, together with the amount of all surplus or secured funds, exceeding ten per cent of their capital, but deducting as before the amount of said stock that should be held by the State, or by any literary or charitable institution. 1 R. S. (Edmonds' ed.) 375. And again in the year 1857 (Session Laws 1857, 2d vol., p. 1), the Legislature enacted that this assessment, with the exception aforesaid, should be upon the capital stock, together with its surplus profits exceeding ten per cent, "at its actual value," thus substituting the principle of ascertaining the value of the stock to be assessed, instead of taxing upon its nominal amount.

The law continued in this form, without alteration, with the exception of the invalid law of 1864, hereafter noticed, until the

year 1865. The National bank system had then become established, and the State banks were rapidly organizing themselves under that authority. The Legislature in that year passed an act (Laws 1865, ch. 97, p. 172) legalizing and facilitating such transfers. In section 10 of the act, they enacted, that all the shares in any of the said banking associations held by any person or body corporate should be included in the valuation of the personal property of such person or body corporate, in the assessment of taxes in the town or ward where such banking association is located, and not elsewhere. This act having been declared by the Supreme Court of the United States to be illegal, on a ground not here material, another act was passed by the Legislature of New York, on the 23d day of April, 1866 (Laws 1866, p. 1647), being the act under which the present question arises. By the first section of this act it is provided that hereafter no tax shall be assessed upon the capital of any bank, \* \* \* but the stockholders in such bank shall be assessed and taxed on the value of their shares of stock therein. The assessment is to be made in the place where the bank is located, and not elsewhere, and the proportionate value of the real estate of the bank is to be deducted from the stock of each shareholder.

We thus see that for a period of nearly fifty years the policy of the Legislature in regard to the taxation of bank capital and bank shares has been uniform. The stock has been taxed at its nominal value, without deduction for debts or charge for surplus, or, as more recently, at its actual value. We see that, as to individual bankers, it was expressly enacted that the capital employed by them should be taxed at the market value of their securities employed, and without deduction for their individual debts. We see again that the taxation of the capital was considered as the taxation of the shares, when the Legislature enact that such taxes shall be deducted from the dividends of the shareholders, or be charged against dividends subsequently to be made. In all of these statutes, the assessment and taxation were based upon the value of the stock of the incorporation. The debits and credits and actual funds of the bank established the subject of taxation, and the condition or circumstances of the individual owning the shares did not enter into the account.

We come then to the inquiry whether under the acts of 1865 and 1866 the same system is carried out, and the shares are to be



assessed and taxed at their value, without regard to the condition of the owner, or whether that system was then abandoned.

It will be borne in mind that the present question is upon the intention of the Legislature, and not upon its power. The power of the Legislature to say that the taxation shall be enforced without regard to the circumstances of the owner, is not disputed. Prior to the organization of the National banking system, the State banks paying taxes upon their capital to the State and to the municipal authorities, possessed an aggregate capital of more than a hundred millions of dollars. Nearly all of these banks have transferred themselves to the United States organization. The State possesses the same power of taxation upon the shareholders (with certain qualifications not here important to be noticed) that it formerly had upon the banks. It has exercised this power, has preserved the forms and manner of bank taxation, so far as they were appropriate, and has given no evidence of any intention to abandon the large field of taxation, so long used by it, or to embarrass and reduce it by allowing the circumstances of the shareholders to form an element in the case. The statute, on the other hand, apparently intends to preserve, as fully as possible, all the connections before existing on this subject. It says that "no tax shall hereafter be assessed upon the capital of any bank or any banking association organized under the authority of this State or of the United States, but the stockholders in such banks and banking associations shall be assessed and taxed on the value of their shares of stock therein." It is quite unusual for the Legislature to enact what they do not intend to tax, or what they do not intend to do in any respect. This preliminary statement, as here embodied, shows that the Legislature wished to preserve the connection and the identity as far as possible between these two subjects of taxation. It is as if they had said, we cannot now tax the National banks as we have been accustomed to do; but instead thereof we will tax their shareholders, and we will apply to them the system of taxation that we have heretofore imposed upon the banks, so far as it is lawful to do so. If such had not been their intention it would have been very easy to have said, that shares in banks shall be taxed like other personal property, in the same manner, and subject to the same rules. On the contrary, they adopt a special system of taxation for those shares, in close resemblance to the mode of taxing bank capital, and declare that such shareholders shall be "as-

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sessed and taxed on the value of their shares." In the general statute which I have before quoted, the assessors are directed to assess to the person named "the full value of all the personal property owned by such person, after deducting the just debts owing by him." 1 R. S. 391. Upon the balance the tax is to be imposed. Under the present statute, no such deduction is referred to, but the person is to be "assessed" not only, but "taxed on the value of their shares of stock therein." The difference is significant.

The direction of the assessors to deduct from the value of the shares of each person a proportionate sum for the real estate owned by the corporation is significant also. It is so not only upon the principle of *expressio unius*, but as indicating the design of the framers of the statute. No such direction is contained in the general tax law, but real estate is there assessed and taxed in one column, and the residue of personal estate, after deducting debts, in another. By the statutes of the United States, the real estate owned by a bank is taxable under the State authority directly against the bank, and the revenue on that subject of taxation is obtained as formerly. When the assessment is made upon the shares, the proportionate value of the real estate is deducted; and the State thus obtains from the bank and the shareholder together, as it did before from the bank alone, a tax upon the full value of both its real and its personal estate. There are still other provisions of this statute which are evidence of the legislative intention to arrange a system of taxation of this kind of property which should be separate from the general system. Thus, by section 5, an action is given to the county treasurer "to collect the tax from the avails of the sale of his shares of stock, and the tax on such shares of stock shall be and remain a lien thereon till the payment of the said tax." No such provision for sale of choses in action is declared by the general tax law, and no such lien is declared in any other part of the tax law of this State upon the property assessed. The 6th section also contains the usual provision, that it shall be the duty of the bank to retain so much of the dividends belonging to such stockholder, as shall be necessary to pay the taxes assessed in pursuance of this act. No such provision was ever introduced into the general tax law of this State, or now exists under the general system. These unusual provisions and directions concur with the previous legislation in indicating the statutory intent, to establish for bank shares a system of taxation

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peculiar to itself, and independent of the general system of taxation in existence in the State. The act of April, 1863, chapter 240, is also strongly indicative of the same intention.

By that act, the Legislature evidently intended to tax the whole available interest in the bank or in its shares. They there provided that a tax should be laid upon "a valuation" equal to the amount of their capital stock paid in and the surplus earnings, less ten per cent, without any deduction. This act was declared void by the Supreme Court of the United States, as laying a tax on the property of the bank, which property, in whole or in part, consisted of stocks of the Federal government. Immediately after this act was declared invalid, the acts of 1865 and of 1866, already cited, were passed by the Legislature.

It is argued in behalf of the respondents that, inasmuch as the statute directs the assessment of the bank shares to be included in "the valuation of the personal property of such stockholder," it subjects it to the operation of the general law in regard to assessments. It is to be observed, however, that this valuation is directed to be thus made in the ward where the bank is located and not elsewhere, whether the stockholder reside in said ward or not. It was the case with this relator, as it must be with many others, that he did not reside in the ward where the bank was located. It thus, by its terms, becomes at once distinguished from the general tax law, which requires this valuation to be made in all cases at the residence of the stockholder, and the indication is given that this valuation was intended to be a part of the special system, which I have already discussed. I have endeavored to show that such was the intention, and this provision is not in conflict with that idea, but forms a convenient portion of the machinery to accomplish it.

It is said that the expression "but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals in this State," aids the argument of the respondent. It is argued that an individual owning a bond and mortgage for \$1,000, and being indebted \$500 could, by the general law, claim to have the \$500 deducted from the value of his bond and mortgage, and that his assessment and taxation should be upon the remaining \$500 only; and that the refusal of a like deduction in favor of the shareholder of \$1,000 would subject him to taxation upon twice as large an amount as was imposed upon the individual. This, it is said, would be imposing a greater rate of taxation upon the share-

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holder. The "rate," or "ratio," is the percentage merely; the "proportion," the "degree." (Webster; Worcester.) If the State imposes a tax of five mills upon the dollar on all the real and personal property of the State, five mills on the dollar is the "rate," the degree, the proportion, the percentage of taxation. This is distinct from the question of exemption. Almshouses and institutions of learning, and the estates of clergymen, to a limited extent, are exempt from taxation. This exemption may compel the payment of a larger amount by the remaining tax payers, in an indirect manner, for the reason that so large a sum does not come into the treasury of the State as if there were no exemptions. If so, it is not because the rate is altered, but because there is less material upon which the tax may attach itself. Rate and exemptions are in no way connected. In their nature, they have no necessary relation to each other. The one directs how much shall be raised upon certain valuations, while the other directs what property shall be subject to taxation and what shall be exempt. The possession of United States securities by a State bank exempts so much of its capital, as is thus invested, from State taxation, but the possession by a National bank of the like securities does not relieve its shareholders to the like amount. Both of these propositions were decided by this court in *The City of Utica v. Churchill* 33 N. Y. 161, and *Van Allen v. The Assessors*, before cited, 3 Wall. 200 (*ante*, p. 1); *Bank Tax Case*, 2 Black, 620. The same question was decided by this court, in October last. *The People ex rel. Kennedy v. The Commissioners of New York*. The fact, therefore, that the same percentage will not produce the same amount of tax when imposed upon a State bank, with a capital of \$100,000, that it does when imposed upon National shareholders to that amount, does not affect the legality of the tax, and as a corollary, does not impose a different rate of taxation. If it imposed a different rate, the tax would be invalid. The case of *The People ex rel. v. The Commissioners of New York*, I understand to be decisive against the argument now under consideration. See opinion of DAVIES, Ch. J., pp. 15, 19, 20.

In *Van Allen v. The Assessors*, *supra*, the Supreme Court of the United States say "upon the whole, after the maturest consideration we have been able to give that case, we are satisfied that the States possess the power to tax the whole of the interest of the shareholder, in the shares held by him in these associations, within

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the limit prescribed by the act authorizing their organization." This proposition was asserted in denial of a claim that the interest of shareholders should be subject to taxation so far only as the capital of the bank was not invested in United States securities, exempt by law from taxation. I think it is correct in its application to the present case. The assessors did right in refusing to make the deduction claimed, and the order appealed from should be reversed with costs.

All the judges concurred in the foregoing opinion, except PORTER and BOCKES, JJ., who dissented.

PARKER, J., delivered a concurring opinion.

*Order reversed.*

## CONKLIN V. THE SECOND NATIONAL BANK.

(45 New York, 655.)

*National banks have no lien on shares for debts.*

A National bank can acquire an interest in its own stock only by a purchase to prevent a loss upon a debt previously contracted in good faith; and a provision in certificates of stock in such bank that they shall not be transferred until all the liabilities of the stockholder to the bank are paid is void and of no effect. \*

**A**CTION to recover shares of stock in defendant's bank which were assigned by one Chandler to the plaintiff. The certificates of shares provided (as did also the by laws of defendant's bank), "that this stock is not transferable until all liabilities of the stockholder to this bank are paid."

\* The Supreme Court of New York, in *Rosenback v. The Salt Springs National Bank*, 53 Barb. 495, held that a National bank could not by a by-law create a lien on its own stock in its favor, but thought that such lien might be valid if provided for in the "articles of association." The Supreme Court of the United States has, since that case, settled the question by holding that neither by its articles of association, by its by-laws, nor by any agreement in the certificates of shares, can a National bank acquire a lien on its stock. *Bullard v. Bank*, ante, p. 93. See also *Evansville National Bank v. Metropolitan National Bank*, ante, p. 189; *Johnson v. Lyflin*, ante, p. 331.

The Court of Chancery of New Jersey held that a National bank could acquire a lien under a by-law to that effect. *Young v. Vough*, 8 C. E. Green, 325, affirmed by the Court of Errors and Appeals, 9 id. 535; but such is not the law since *Bullard v. Bank*.—REP.

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At the time Chandler transferred the stock to plaintiff, he was indebted to the bank in the sum of \$4,000 for moneys which he had collected for the bank, but had not paid over. The defendant claimed to have a lien on the stock for such indebtedness.

The plaintiff had a judgment which was affirmed by the Supreme Court, at General Term (53 Barb. 512), and defendant appealed.

*John C. Churchill*, for appellant.

*Amasa J. Parker*, for respondent.

GROVER, J. The defendant, as appears by the case, was incorporated under the National Currency Act of 1863. Section 25 of that act provides that the banks shall have a lien upon the stock of each stockholder for all debts and liabilities from him to the bank unpaid, and no transfer of the stock of the bank shall be valid until all debts and liabilities of the stockholder making the transfer are paid, and this provision shall be inserted in substance in the certificates of stock issued by the bank. Section 21 provides that certificates of stock signed by the president and cashier may be issued to stockholders, and the certificates shall state on the face thereof that the stock is transferable only upon the books of the bank, and that, when the stock is transferred, the certificate thereof shall be returned to the bank and canceled, and new certificates issued. The certificates for stock issued by the defendant to the plaintiff's assignor, pursuant to the requirement of the 25th section, expressed on their face that the stock was not transferable until all liabilities of the stockholders to the bank were paid. It is entirely clear that, by the Currency Act of 1863, a lien was given, to all banks organized under it, upon the stock of each stockholder for all debts and liabilities to the banks. This lien did not arise from any by-law of the banks, but was given expressly by the statute authorizing the incorporation of this class of institutions. But the act of 1863 was repealed by the 62d section of the Currency Act of 1864, passed June 3d of that year. 13 U. S. Stat. at Large, 99. That section provides that the act entitled an act to provide a National currency, etc., approved February 25th, 1863, is hereby repealed; provided that such repeal shall not affect any appointments made, acts done, or proceedings had, or the organization, acts or proceedings of any association organized or in the process of organization under the act aforesaid, and provided also that all

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such associations, organized or in process of organization, shall enjoy all the rights and privileges granted, and be subject to all the duties, liabilities and restrictions imposed by this act, and provided, further, that the circulation issued or to be issued by such association shall be considered as a part of the circulation provided for in this act. The intention of this section was to continue in existence all banks organized under the act of 1863, with the same powers and privileges, and subject to all the restrictions conferred and imposed upon those thereafter organized under the act of 1864. The provisions giving a lien to a bank upon the stock of its stockholders or any debt or liability of a stockholder to the banks and for expressing such liability upon the face of the certificates issued to holders of stock contained in the act of 1863, were not re-enacted by the act of 1864. The defendant cannot, therefore, sustain the lien claimed upon the act of Congress under which it is incorporated. Were there no restrictions imposed by the act of 1864, upon banks acquiring liens upon its stocks for the debts and liabilities of its stockholders to it, the only question in the case would be, whether a lien in its favor was created by the by-law enacted by its directors, declaring that its stock should be subject to such lien. But the act of 1864 does impose restrictions upon banks in this respect. Section 35, 13th U. S. Statutes at Large, 110, provides that no association shall make any loan or discount on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent loss upon a debt previously contracted in good faith, and stocks so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale, in default of which a receiver may be appointed to close up the business of the association according to the provisions of the act. It was held by the United States Supreme Court in *The First National Bank of South Bend v. Lanier*, (*ante*, p. 70), that a pledge of his stock to the bank as a security for such money as the bank might deposit with a banking firm of which the stockholder was a member, was prohibited by the above section, and therefore void. Justice DAVIS in giving the opinion of the court says: "These institutions were created to subserve public purposes, and not the mere private interests of their stockholders, and in no better way could this object be attained, than by placing shareholders in their pecuniary dealings with the

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bank on the same footing with other customers. Besides, how could the capital of the bank be kept available for active use, if the shareholder, who had pledged his stock for borrowed money, should be unable to meet his obligation? To the extent of the debt, the capital would be withdrawn, and it is hardly possible that this could be the case for any length of time were the debt secured outside of the stock." The learned justice answers the argument of the plaintiff's counsel: That deposits are neither loans nor discounts, and comes to the conclusion that they are loans within both the letter and spirit of the section, whether interest was agreed to be paid thereon or not. The question in the present case is not, upon principle, distinguishable from *The Bank of South Bend v. Lanier* (*ante*, p. 70). In the present case the plaintiff's assignor, who was a private banker, and the defendant, were the agents of each other for the collection of paper belonging to one against parties in the vicinity of the other, and for paying checks drawn upon the other presented by holders thereof. The course of business was that each credited the other in account for the money collected upon paper sent for collection, and charged such checks drawn upon the other as were paid. These accounts were, from time to time, settled, and any balance due paid by the debtor party. The money collected upon paper remitted for that purpose, when credited in account by a banker, with the consent of the party owning the paper, becomes, to all intents and purposes, a deposit, and comes directly within the rule settled in *The Bank v. Lanier*. Besides, the construction put upon the section in that case, and the reasons assigned therefor, lead necessarily to the conclusion that all agreements by a stockholder, providing that the bank shall have a lien upon his stock for any liability thereafter created by him to the bank, are within section 35 of the act, and void. That the bank can only acquire an interest in its stock by an absolute purchase, to prevent a loss upon a debt previously contracted in good faith. When the statute has prohibited all express agreements between a bank and its stockholders for a lien in favor of the former upon the stock of the latter, to secure any debts or liabilities of the stockholders to the bank, that no such lien can be created by a mere by-law of the bank is too clear to require discussion.

The judgment appealed from must be affirmed with costs.

All agreeing, except PECKHAM, J., who does not vote.

*Judgment affirmed.*



## FIRST NATIONAL BANK OF SANDY HILL V. FANCHER.

(48 New York, 524.)

*Tax on National bank shares — Right of collector to seize property of bank.*

A warrant for the collection of a tax assessed to the shareholders on shares of stock in a National bank, directed the collector "to levy the same of the goods and chattels of such persons." *Held*, that the collector could not thereon seize the property of the bank to pay the tax.

ACTION by the bank for trespass by the defendant, a collector of taxes of the village of Sandy Hill, in taking possession of the money and property of the bank. The defendant having a warrant to collect a tax assessed on certain residents of Sandy Hill on stock owned by them in the First National Bank of Sandy Hill, and which directed him "to levy the same of the goods and chattels of such persons," demanded payment thereof of defendant, which being refused he seized the property of the bank. All the stockholders assessed had personal property in the village.

*L. H. Northrup*, for appellant.

*U. G. Paris*, for respondent.

HUNT, C. The warrant in the hands of the defendant, as collector, directed him to collect the amounts specified from the persons named, and "to levy the same of the goods and chattels of such persons." Assuming the regularity of the assessment, that the property was subject to the assessment made, and that the bank held the funds with which the tax should have been paid, the defendant is not justified. By his warrant, if necessary to obtain payment, he was authorized to levy upon the goods of the persons named. No other authority was confided to him. This authority is special and exceptional. It must be pursued according to its terms. Allen Brothers were the first persons named in the assessment-roll given in evidence. Their property was assessed at \$10,000, and a tax of sixteen dollars was imposed upon the same. This tax the collector was authorized and directed to collect by a levy and sale of the goods and chattels of the Messrs. Allen, if this

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sum should not be voluntarily paid. But he had no authority to levy upon the goods of another person to make this sum. His authority did not reach to that extent. He probably had no authority to make such a levy and sale, even with the consent of such other person. His authority was limited to two precise acts; first, to receive a voluntary payment; second, if such payment was not made, to levy upon and sell the goods of the persons named in the tax list. If the Sandy Hill Bank had undertaken to pay these taxes, there was probably a way in which the performance of their engagement could have been enforced, if payment could not have been otherwise obtained. But it is too clear for argument, that a tax collector could not enforce such an agreement by a seizure and sale of the property of the bank.

The assessment upon the shares of a National bank was for a tax imposed by authority of the State of New York. It was made in the autumn of the year 1865, and by virtue of the statute of the State of New York, passed in that year. Laws 1865, ch. 97, § 10, p. 172. It has been expressly adjudged by the Supreme Court of the United States (*Van Allen v. The Assessors*, 3 Wall. 573 [*ante*, p. 1]), that this statute was invalid, and that a tax imposed under its authority could not be enforced. *The City of Utica v. Churchill*, 33 N. Y. 161, holding the contrary doctrine, was reversed by the case of *Van Allen v. The Assessors*. The tax sought to be enforced in this case was not therefore legally imposed. The judgment must be affirmed, with costs.

All concur.

*Judgment affirmed.*

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COOKE V. THE STATE NATIONAL BANK OF BOSTON.

(52 New York, 96)

*National banks — Action against, in State court — Removal of cause — Certification of check.*

Action brought by a citizen of New York, in a State court of New York, against a National bank located in Boston. *Held*, (1) that the court was not ousted of jurisdiction by section 57 of the National Currency Act (12 Stat. at Large, 99), that statute being permissive and not mandatory as to the courts in which a National bank may be sued; and, *semble*, that Congress

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had not the power to deprive State courts of jurisdiction in such cases; (2) that the defendant was a citizen of Massachusetts, within the meaning of the acts relating to the removal of causes to the Federal courts; (3) that the joinder in the action as defendants, of the drawers of the check, would not deprive the bank of the right to alone apply for a removal of the case to the Federal court, the causes of action being distinct and only properly joined by virtue of a State statute; (4) by a divided court, that the cause could not be removed by the bank into the Federal court, under the act of Congress of March 2, 1867, as, being a corporation, it could not make the affidavit required by the act. (*See note, p. 714.*)

In an action by a *bona fide* holder of a check drawn on defendant, a National bank, and certified by its cashier, *held*, that the defendant was liable, although the drawer had no funds in the bank when the check was certified.

**A**PPEAL from a judgment of the Supreme Court, at General Term, in the First Department, affirming a judgment in favor of the plaintiff, entered upon a verdict. S. C., 50 Barb. 339; 1 Lans. 494.

The action was upon a check, drawn by the defendants, Mellen, Ward & Carter, under their firm name of Mellen, Ward & Co., upon the defendant, the State National Bank of Boston, and certified by its cashier. At the commencement of the suit, the plaintiff was a citizen and resident of the State of New York, and a member of the firm of Jay Cooke & Co., of the city of New York, and had been such member for a year previous, and was so at the time of the trial.

The defendant, the bank, was a duly organized National bank, under the National Bank Act of June 3, 1864, and carried on business in the city of Boston, Mass., and not elsewhere. The defendants, Mellen, Ward & Carter, were, at the time of the transaction in question, money brokers in Boston, under the firm name of Mellen, Ward & Co. They did not appear in the action.

The check, upon which the action was brought, was drawn by Mellen, Ward & Co. upon the State National Bank of Boston, dated Boston, February 28, 1867, payable to Gould or bearer, for \$125,000. Across the face of the check was written, "Good, C. H. Smith, Cash." C. H. Smith was then the cashier of said bank. The check was indorsed as follows:

"Pay Jay Cooke & Co., or order,

"AND. J. LOUD, Cas.

"Pay to the order of Pitt Cooke, without recourse to Jay Cooke & Co."

Andrew J. Loud was then the cashier of the Second National Bank, Boston.

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The check, with this writing across the face of it, was delivered by Ward, Mellen & Co. to the Second National Bank, together with \$15,000 in bills, on the day of its date, in payment of a draft by Jay Cooke & Co., on said Mellen, Ward & Co., for \$140,050, dated February 27, 1867, drawn against a remittance of \$100,000 in gold certificates, which were sent at the same time to the Second National Bank, to be delivered to Mellen, Ward & Co. on their payment of the draft. The bank, on receiving the check and bills, delivered the gold certificates to Mellen, Ward & Co.

The check was received by the Second National Bank, near the close of business hours, and at the suggestion of Mellen, Ward & Co. it was kept back, and not sent to the clearing house on that day. Mellen, Ward & Co. were not depositors in the State National Bank, and had no funds in the bank at the time. The next day (March 2) the check was presented for payment, through the clearing house, and payment refused.

On the 21st of November, 1866, about three months prior to the receipt of the check by the Second National Bank, a meeting of the banks in Boston was held at the clearing house, to consider the subject of receiving certified checks, instead of bills, in payment. Both the Second National Bank and the State National were represented at this meeting. A resolution was adopted in substance, that the associated banks approved adopting a custom of receiving certified checks, "provided that the directors of each bank, so certifying, shall first have passed a vote agreeing that their respective banks shall be bound by such act of certification." Of the banks present, all except three voted in favor of the resolution. The State National was one of the three voting in the negative. The Second National voted in the affirmative. The action of the president of the bank, in voting in the negative, was reported to the board of directors, at its first meeting afterward and was approved by the directors. On the 5th of December, 1866, a circular was sent by the manager of the clearing house to all the banks in Boston, members of the clearing house association, and among others, to the Second National Bank, containing the names of the banks which had voted to authorize their officers to certify checks under the resolution, and notifying the banks who intended to enter into the arrangement, to inform the manager of the clearing house, "in order that the banks may receive an early notice of the same." The State National Bank did not enter into the arrangement.

In December, 1868, after this suit was at issue, the defendant, the State National Bank, applied to the court, at Special Term, upon an affidavit of seven of the directors of the bank, for the removal of the cause into the Circuit Court of the United States for the Southern District of New York. An order was made by Judge CARDOZO transferring the cause to that court, and directing this court to proceed no further in the action, as against the bank, which order was reversed by the General Term on appeal, and on re-argument, the General Term reaffirmed its former decision, on the ground that Mellen, Ward & Carter were not parties to the application.

On the trial, before the case had been opened by the plaintiff's counsel, a *protest* was made on the part of the bank, that the court had no jurisdiction to hear or try the action, on the ground that it had been removed to and was then pending in the Federal court. And a motion was made to dismiss the complaint for want of jurisdiction on that ground, which was denied. The counsel for the bank also protested that the court had no jurisdiction to hear and try the action, on the ground that under the act of Congress of June, 1864, under which the bank had been created a National bank, it could only be sued in a Circuit or District Court of the United States, held within the State of Massachusetts, or in a court in the county or city in which the bank was located, having jurisdiction in similar cases, and moved to dismiss the complaint for want of jurisdiction, on that ground. This motion was also denied. The defendant's counsel also moved to dismiss the complaint on the ground that there was not sufficient evidence to entitle the plaintiff to go to the jury and also moved the court to direct a verdict for the defendants, both of which motions were denied.

The court directed the jury to find a verdict for the plaintiff for the amount of the check in suit \$125,000, with interest, to which direction and decision the defendant's counsel excepted. The jury thereupon found a verdict for the plaintiff for \$152,999.88.

*E. W. Stoughton*, for appellants. After an order is properly made, removing a cause into the Federal court, the State court has no jurisdiction. Act of Congress, March 2, 1867; 14 Stat. at Large, 558; *Kanouse v. Martin*, 15 How. 198; *Gordon v. Longest*, 16 Pet. 97; *Livermore v. Jenks*, 11 How. Pr. 479; *Vandervoort v. Palmer*, 4 Duer, 677; *Illus v. N. Y. & N. H. R. R. Co.*, 13 N. Y. 597;

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*Stevens v. Phoenix Ins Co.*, 41 id. 149; see *Bliven v. New England Screw Co.*, 3 Blatchf. 111; *Disbrow v. Driggs*, 8 Abb. 306; *Jones v. Seward*, 26 How. Pr. 436. While the bank was a State bank, Massachusetts was its *habitat*, and from that a conclusive presumption would arise that its officers and managers were citizens of that State. *Rundle v. Del. & Raritan Canal Co.*, 14 How. 80; *Marshall v. Balt. & Ohio R. R. Co.*, 16 id. 14; *Louisville R. R. Co. v. Letson*, 2 id. 497; *Covington Draw Bridge Co. v. Shepherd*, 20 id. 233; *Ohio & Mississippi R. R. Co. v. Wheeler*, 1 Black, 286. The rule is the same in respect to National banks. *Manuf. Nat. Bank v. Baack*, 40 How. Pr. 409; 8 Blatchf. 137. The union of parties, without interest, with the real parties to a litigation cannot oust the Federal courts of jurisdiction if the character of the real parties is such as to confer it. *Wood v. Davis*, 18 How. 467; *Wormley v. Wormley*, 8 Wheat. 451; *Louisville R. R. Co. v. Letson*, 2 How. 497; *Browne v. Strode*, 5 Cr. 303; *Livingston v. Gibbons*, 4 Johns. Ch. 94; *Ward v. Arredondo*, 1 Paine's C. C. 410; *Norton v. Hayes*, 4 Denio, 245; *Vandevoort v. Palmer*, 4 Duer, 677. Under the act of June 3, 1864, a National bank can be sued only in a Circuit or District Court of the United States, or in a State, county, or municipal court of the State in which the bank is located, having jurisdiction in similar cases. 13 Stat. at Large, 99; 12 id. 665, § 59; *Bank of U. S. v. Deveux*, 5 Cr. 85, 86; *Osborn v. Bank of U. S.*, 9 Wheat. 728; *Crisp v. Banbury*, 8 Bing. 394; *Minor v. Mechs. Bank*, 1 Pet. 46, 64; *Crocker v. Marine Nat. Bank*, 101 Mass. 240. The certification of the cashier was void. *F. & M. Bank Case*, 16 N. Y. 125; *N. H. R. R. Case*, 34 id. 30; *Bank of U. S. v. Dunn*, 6 Pet. 51; *Fleckner v. U. S. Bank*, 8 Wheat. 338; *U. S. v. City Bank*, 21 How. 356; *Mussey v. Eagle Bank*, 9 Metc. 306; *Fulton Bank v. N. Y. & Sharon Canal Co.*, 4 Paige, 127; *Kirk v. Bell*, 12 Eng. Law & Eq. 385; Ang. & Ames on Corp., §§ 299, 300, 301; Story on Agency, §§ 114, 115; 13 Stat. at Large, 19. The rule laid down in *N. Y. & N. Haven R. R. Co. v. Schuyler*, 34 N. Y. 38, if it be now the law of New York, is not the law of Massachusetts. *Mussey v. Beecher*, 3 Cush. 511; *Lowell Bank v. Winchester*, 8 Allen, 109; *Benoit v. Conway*, 10 id. 528. Nor is it the law of England (*Grant v. Norway*, 10 C. B. 665; *Hubbersty v. Ward*, 8 Exch. 330; *Alexander v. Mackenzie*, 6 C. B. 766; *Stagg v. Elliott*, 12 C. B. [N. S.] 373; *Baines v. Ewing*, Law Rep., 1 Exch. 320), or of the National courts. *Freeman v. Buckingham*, 18 How. 182. The check

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was certified to be used as currency ; the certificate was void, being without power under the organic law, and as creating a currency prohibited by that law. 12 Stat. at Large, ch. 106, §§ 8, 22, 23, 24, 45; *Davidson v. Lanier*, 4 Wall. 447; *Bank of U. S. v. Owens*, 2 Pet. 527; *Root v. Godard*, 3 McL. 102; *Hayden v. Davis*, id. 276; *Safford v. Wyckoff*, 1 Hill, 11; *Smith v. Strong*, 2 id. 241; *Bank of Orleans v. Merrill*, id. 295; *Leavitt v. Palmer*, 3 N. Y. 19; *Veazie Bank v. Fenno*, 8 Wall. 533. Notice to the Second National Bank of a want of authority to certify, on the part of the defendant's cashier, was, in law, notice to Jay Cooke & Co. and to the plaintiff. Story's Eq. 408, and note; *Toulmin v. Steere*, 3 Meriv. 222; *Hargreaves v. Rothwell*, 1 Keen. 154; *Nixon v. Hamilton*, 2 Dru. & War. 391; *Fuller v. Bennett*, 2 Hare, 394; *Gerrard v. O'Reilly*, 3 Dru. & War. 414; *Majoribanks v. Hovenden*, Drury, 11; Story on Agency, § 139; *Lowther v. Carleton*, 2 Atk. 342; 1 Liv. on Agency, ch. 10, § 3; *Fulton Bank v. N. Y. & Sharon Canal Co.*, 4 Paige, 137.

*John E. Burrill*, for respondent.

CHURCH, Ch. J. The jurisdiction of the State court is denied upon two grounds : 1. That the National Currency Act of Congress prohibited original jurisdiction ; and 2. That the cause has been removed from the State to the Federal courts.

The alleged prohibitory statute is the 57th section of the aforesaid act (13 Stat. at Large, 99), and provides : "That suits, actions and proceedings against any association under this act *may* be had in any circuit, district or territorial courts held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases. *Provided, however*, that all the proceedings to enjoin the Comptroller under this act *shall* be had in the circuit, district or territorial court of the United States held in the district in which the association is located."

I think the proper construction of this section is to regard the power conferred, of bringing actions against the associations in specified courts, as permissive and not mandatory. The framework of the section implies that intention. The words "may" and "shall" are both used ; the former to confer a privilege, the

latter as a mandate. It is presumed that the attention of Congress was drawn to the distinction between the ordinary import of the two words, and that they were used with reference to that distinction, and hence that, if it had been designed to limit prosecutions to the specified courts, the same word would have been employed as in limiting a particular proceeding to a specified court.

There are no words of exclusion in the act, and it is a general rule as to jurisdiction, that to confer it upon one court does not operate to oust other courts before possessing it, for the reason that concurrent jurisdiction is not inconsistent. 2 Hill, 164. This rule would be specially applicable to the 59th section of the act of 1863, of which the section in question is an amendment. By that section, suits by and against these associations were authorized to be brought in the Circuit and District Courts of the United States, without mentioning State courts; and no one, I think, ever supposed that the privilege conferred by that section precluded actions in State courts. There is some force in the argument that the specification of State courts in the act was unnecessary and useless, unless the clause was intended as restrictive; but this is far from conclusive. Words are often used in a statute for the purpose of producing or preventing a particular inference from other words, and sometimes without necessity or pertinency. After authorizing suits in local Federal courts, a similar power in local State courts may have been deemed proper to prevent an inference that jurisdiction was intended to be restricted to the former. At all events, I am unwilling to hold that the jurisdiction of the State courts was intended to be taken away upon doubtful or ambiguous language. Such a construction would enable these associations to delay and defraud their creditors, and produce inconvenience and expense to suitors, involving an amount of injustice which we cannot attribute to the intention of the law-making power. I lay no stress upon the 8th section, because the authority to sue and be sued conferred by that section confers a corporate attribute and does not relate to jurisdiction.

But if this construction of the act is erroneous, I do not think it competent for Congress to deprive the State courts of jurisdiction in all actions against these banking associations. It is proper to observe in the first place that there are no words of exclusion in the Constitution itself. The second section of the third article declares that "the judicial power shall *extend* to all cases arising under



this Constitution, the laws of the United States, and treaties made," etc., and it may well be doubted whether as to such jurisdiction as the State courts before possessed, not relating to subjects growing out of the organization of the government or the specific powers conferred upon it, it was intended to confer by this clause any other than concurrent power. Federalist, No. 82, 2 Hill, *supra*. However this may be, it is clear that the exercise of the power must be confined to the cases to which the judicial power extends, viz., to cases arising under the Constitution, laws or treaties of the United States, and unless it can be established that every possible action is a *case* arising under the Constitution or laws of the Union, a general prohibition against actions in State courts would be invalid, and a restriction to particular courts equally so. The case of *Osborn v. The Bank of the United States*, 9 Wheat. 738, is relied upon as authority for the exercise of this power. That was an action in equity, brought by the bank to restrain the officers of the State of Ohio from collecting a penalty imposed by way of a tax in gross, for its continuing to transact business within the State after a certain period. Upon the theory upon which the bank was created as one of the agencies of the government, that was clearly a case to which the judicial power of the Union extended, and it was competent to authorize such an action to be brought in the United States Circuit Court, and the question of jurisdiction might have been disposed of by restricting the act to such cases.

The opinion of Chief Justice MARSHALL goes to the length, however, of holding that every action which the bank might bring was a case arising under the Constitution and laws of the Union, and this was placed mainly upon the ground that the right to sue depended upon its corporate existence, created by Federal power, and that the possibility that this right might be questioned in any suit constituted a case arising under the Constitution and laws of the United States, without regard to the fact whether any such question was raised or not.

As an original question, I should doubt the soundness of this view, and prefer to adopt the views expressed in the dissenting opinion of JOHNSON, J. But the decision is not decisive of the question as presented in this case. It would be an unwarrantable extension of the principle of that case to apply it to every action against a corporation created by Congress. Whether a corporation

was created by one power or another is manifestly immaterial in many actions which might be brought against it. The commencement of a suit admits the capacity of the corporation to be sued, and the very first step of the plaintiff may show that no question can arise of Federal cognizance. Take, for example, an action to recover money, the complaint alleging that the plaintiff deposited \$100 with the bank defendant, which on demand it refused to pay, and issue is joined by a denial that the plaintiff ever deposited the money. Can it be that this is a case arising under the Constitution and laws of the United States? To regard it as such involves the perversion of legal language. Nor can any reason be assigned why a strained or artificial construction should be adopted for the purpose of depriving State tribunals of their legitimate functions. Under the appellate jurisdiction of the Supreme Court of the United States, which is referable to the same general power as the original jurisdiction, it is well settled that it is not sufficient to show that a question might have arisen, unless it is shown that it did in fact arise in the case. 10 Pet. 368 ; 12 Wheat. 117. I insist that the possibility of a question does not make a case arising under Federal law; but if it did, in the case supposed, and in most others likely to be brought, it is difficult to see how any such question could be raised.

The existence of the corporation is conceded by suing it as such, and the issue made is confined to the fact of receiving the money. This view can work no injustice to these associations nor deprive them of any right to be heard in the United States court, if the case is one to which the jurisdiction extends, as the right of removal, both on account of the nature of the case and the condition of citizenship, is secured by various statutes.

The United States Bank was chartered as a fiscal agent of the government, while these associations were created under a supposed power to furnish a National paper currency ; but the distinction, so far as it has any bearing upon the present question, is in favor of the jurisdiction of the State courts, and against the power of restriction. Upon all questions respecting State and Federal powers, the utmost fairness and forbearance should be exercised in drawing the line between them. There is no antagonism in theory between the two governments, and if each would refrain from the exercise of doubtful powers, no collision would ever occur. While, as we hold, Congress did not intend to oust the State courts of jurisdic-

tion by this act, we are confident that no such power has been conferred by the Constitution. If the Federal Legislature may create corporations for the transaction of the banking business of the country, and confine all legal proceedings by and against them to Federal courts, it requires only another step in the same direction to create corporations for the transaction of railroad, telegraph, express and manufacturing business, and thus to usurp control over the whole business of the country and the internal affairs of the States, absorbing the judicial functions of State courts and reducing the States themselves to mere government skeletons without power or vitality, a result which no friend of the Constitution or of republican institutions can desire.

The second objection to the jurisdiction of the court is that the cause was lawfully removed from the State to the Federal court. The removal is claimed to have been effected under the act of March 2, 1867. No order of the State court is necessary, but the removal is effected by a compliance with the statute. The only discretion which the State court can exercise is in respect to the sufficiency of the surety. 5 Blatchf. 336; 6 id. 362.

The counsel for the plaintiff urges three objections to the validity of the removal: 1. That the bank defendant, being an association organized under the National Currency Act, is not a citizen of Massachusetts within the meaning of the Constitution.

The Federal courts at an early day felt some embarrassment in holding that corporations were entitled to the rights of citizens in suing and being sued, resulting from an opinion then entertained that corporations could not be regarded as citizens within the meaning of the United States Constitution. The difficulty was at first overcome by holding that the court would look behind the artificial being, to the corporators, and if all of them resided in a different State from the one in which the suit was brought, and where the other party resided, it should be deemed a suit between the corporators and the other party. 3 Cranch, 267; 5 id. 84. These decisions necessarily involved the act that all corporators must reside in one State. 14 Pet. 60.

But in the case of the *L. C. & C. R. R. Co. v. Letson*, 2 How. (U. S.) 497, this doctrine was modified; and it was decided that a citizen of one State could sue a corporation created by and transacting its business in another State, although some of the members of the corporation were not citizens of that State.

It was stated by Chief Justice TANEY, 1 Black, 296, that the decision in the Letson case was based upon the legal presumption that all the members of a corporation are citizens of the State in which alone the corporate body has a legal existence, and that no averment or evidence to the contrary is admissible; and, hence, that a suit by or against a corporation is a suit by or against citizens of the State which created the corporate body. The same thing had been stated by the same learned judge in 20 How. 232; and is reiterated by BLATCHFORD, J., in *M. N. Bank of Chicago v. Baack*, reported in 40 How. Pr. 409. CATRON, J., in *Rundle v. D. and R. C. Co.*, 14 How. (U. S.) 95, states that the Letson case decided that, if the president and directors are citizens of the State where the corporation was created, and the other party is a citizen of another State, the Federal courts have jurisdiction; while, in *Cowles v. Mercer County*, 7 Wall. 121, the present chief justice states that the decision in the Letson case is, "that a corporation created by the laws of a State, and having its place of business within that State, must, for the purposes of suit, be regarded as a citizen within the meaning of the Constitution, giving jurisdiction founded upon citizenship;" and he adds: "In the case before us the corporators are all citizens of Illinois, and the corporation is liable to suit within the narrowest construction of the Constitution."

With these conflicting views as to the decision in Letson's case, the only safe guide is the opinion pronounced; and with all due respect, it seems to me that it was intended to decide that corporations are citizens of the States which create them, irrespective of the residence of the corporators; and that the presumption of such residence formerly indulged, and whether regarded as one of fact or law was intended to be ignored and disregarded. WAYNE, J., in delivering the opinion, declared that the court intended to decide "that a corporation, created by and doing business in a particular State, is to be deemed to all intents and purposes as a person, although an artificial person, an inhabitant of the same State, for the purposes of its incorporation, capable of being treated as a citizen of that State as much as a natural person;" and, in closing his opinion, adds: "We confess our inability to reconcile these qualities of a corporation — residence, habitancy and individuality — with the doctrine that a corporation aggregate cannot be a citizen for the purposes of a suit in the courts of the United States,

unless in consequence of a residence of all its corporators, being of the State in which the suit is brought. When a corporation exercises its powers in the State which chartered it, that is its residence ; and such an averment is sufficient to give the Circuit Courts jurisdiction."

As an original question, it seems clear that the residence and citizenship of a corporation should be determined without regard to the residence of its corporators. No valid reason is perceived for applying the presumption, or, if applied, it furnishes no ground for the doctrine that the suit is by the corporators in their personal capacity. Although they have an interest in the suit, they are not parties in any legal sense, and their interests are merged in the corporate body. But I cannot agree with the counsel for the plaintiff, that if the doctrine of presumption is to be maintained it would not apply to these banking associations. Their location and place of business are fixed by the law of their creation. They are made inhabitants of States for the purposes of taxation, and a majority of their managing officers are required by law to reside in the States of their respective location. I see no reason why this artificial presumption should not as well apply to them as if incorporated by State authority, especially as in this case where a State bank by virtue of the statute was transmuted from a State to a National bank. The day before the change it is admitted that the presumption would apply, while the day after it is insisted that it would not, although the change was in form only, and not in substance. Independent of this presumption, these banks should be deemed citizens of the States where by law they are located, within this clause of the Constitution, and this does not impair the decisions in this State, holding that they are foreign corporations under our attachment laws, although located here, because these decisions are based upon the statutory definition of foreign corporations.

My opinion is that the bank defendant had a right, as citizen of another State, to apply for a removal of the suit. 40 How. Pr. 409.

The next objection is, that all the defendants residing in Massachusetts did not apply, and that it is not competent for one of several defendants residing in another State to remove a suit. This is the general rule. It was frequently so held under the act of 1789, and I think is the rule under all the acts, except the act of 1866, which expressly provides for a removal by one or more defendants. I think also, although with some doubt, that applications

under this act must come under the general rule. This doubt arises from the fact that this act was passed as an amendment to the act of 1866, which provided for a removal by one of several parties, and from the peculiar phraseology of the act, that when a suit is pending "in which there is a controversy," etc., between citizens of different States it may be removed, but although called an amendment to the act of 1866, it provides for a new cause of removal and by either party, and for removing the entire suit, and the word "controversy" should be held co-extensive with the whole issue. The general rule, that all the parties must join in the application for removal is applicable to applications under this act, but the objection is answered by the exception established to the general rule, which is, that improper, formal or unnecessary parties need not join in the application. 8 Wheat, 451; 5 Cranch, 303; 2 How. 497; 4 Johns. Ch. 94. There are in this case two actions in one, against different parties, and the actions are united by virtue of a statute of this State. The action is against the bank defendant as the certifier of the check, and against the other defendants as drawers. It was unnecessary, and, but for the statute, improper to unite the causes of action in one suit. The defenses are distinct and entirely independent of each other, and separate judgments could be entered. It would be unjust to deprive one party of the right of removing his suit, because another action against other parties was allowed to be united in the same suit, and I do not think that a statute of this State can have that effect upon the right of removal by other parties under a Federal law. It is not necessary to determine whether such removal would carry the suit against the other parties into the Federal court or not. My opinion is that it would not, and that by the removal the action would become severed, one going to the Federal and the other remaining in the State court.

The last objection to the validity of the removal is, that a corporation cannot avail itself of the act of 1867, by reason of its incapacity to make the affidavit required by the act. It is urged by counsel that this act confers upon one party extraordinary power over the litigation, enabling it, by an *ex parte* oath of mere belief of the existence of a fact, which cannot be contradicted, and after having the benefit of all the "law's delay" in the State court, to remove the suit to another court, and that it should be strictly construed, and hence that it should be held to apply to such a party

only as is capable of entertaining and expressing a belief, and that the affidavit can in no case be made by any other than the party himself.

There is a difference of opinion among the members of the court upon the point; and upon consultation we have concluded, as probably the most conducive to the interests of both parties in facilitating the final disposition of the case, to sustain the objection and hold that it was not removed.

This brings us to the exceptions at the trial upon the merits. The views expressed by the Supreme Court of the United States in the recent case of *Merchants' Bank v. This Same Defendant*, 10 Wall. 604 (*ante*, p. 47), and which accord with repeated decisions of this court, render an elaborate discussion unnecessary.

The certification of a check, if written out, would contain a statement that the drawer had funds sufficient to meet it in the bank applicable to its payment, and an agreement on behalf of the bank that these funds should be retained and paid upon the check whenever it was presented. The cashier has a right, by virtue of his office, to make this certificate when the drawer has funds. He is the custodian of the funds of the bank and of the books; he receives money and gives vouchers therefor; and whether upon receiving a check he pays it in money or gives the holder a certificate of deposit or draft, or a certificate that he will retain sufficient of the money standing to the drawer's credit to pay it when presented, he is, in either case, acting within the line of his duty and within the scope of the authority which necessarily attaches to his office.

Whether the bank might not restrict this authority, so as to affect the rights of persons having notice, is not material. It is sufficient that the public have a right to regard his authority as co-extensive with these duties, and that such authority is inherent in the office. This is substantially conceded by the learned counsel for the appellants, but they insist that the cashier has no power to make the certificate when the drawer has no funds. I agree that he has not, as between him and the bank, and the liability of the bank is not based upon his power to bind them by such a contract without funds, but upon the ground that the bank cannot dispute the fact that there are funds, and hence the contract is enforced as though there were funds to meet it. It follows that a *bona fide* holder only can enforce the liability against the bank, where the certificate is given in the absence of funds.

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The bank having placed the cashier in the position which implies this inherent authority, those who deal with the bank have a right to infer that he possesses it, and although the exercise of it in a given case may not be warranted on account of the existence or non-existence of some extrinsic fact peculiarly within its official knowledge, yet the bank is responsible instead of an innocent party, upon every principle of reason and morality. This principle applies to the ordinary relation of principal and agent, and, *a fortiori*, when the employment concerns the general public involving extensive commercial transactions. *Farmers', etc., Bank v. Butchers', etc., Bank*, 16 N. Y. 125; *Schuyler's Case*, 34 id. 30. *Ultra vires* cannot be alleged for telling the truth, even by bank officers, nor can they insist upon a falsehood to the injury of one who has confided in their veracity.

The import of a certification and the liability of the bank upon the principle here indicated legally result from the nature of the agreement and the application of well-settled rules of law, and do not depend upon usage or custom. Whether it is competent for banks, by usage or express agreement, to extend their liabilities so as to include cases where certificates are issued without funds, to the knowledge of the holder, it is unnecessary to determine. SELDEN, J., in 16 N. Y. 128, expressed the opinion that banks have no power to loan their credit in that form. It is clear, however, that where such a certificate is made without funds, by a cashier in fraud of the rights of the bank, no one but a *bona fide* holder can enforce it.

It is claimed by the counsel for the appellants that the refusal of the bank defendant to unite with other banks in Boston in the adoption of a custom to receive from each other certified checks in payment for balances and collections, of which the Second National Bank, the agent of the plaintiff's assignors, and who received the check in question, had notice operated to charge such agent with notice that the cashier had no authority to certify this particular check, and that the principals, Jay Cooke & Co., are chargeable with the knowledge of their agent; and hence that the plaintiff, having only their title, is not a *bona fide* holder. Without inquiring whether all these consequences would follow, I am of opinion that the principal proposition is untenable, viz.: that notice of the refusal to co-operate with the other banks by the bank defendant operated as a notice of a want of authority by the cashier to certify



this check. The proposed custom of settling balances at the clearing house by certified checks was a clearing house arrangement for the convenience of the banks themselves, and was subject to such restrictions and regulations as they saw fit to impose or adopt; but the refusal of any particular bank to enter into the arrangement would not affect the power of its cashier to certify checks in the ordinary manner when the drawer had funds, nor the liability of the bank to a *bona fide* holder when he had not.

The most that can be claimed is that the Second National Bank had constructive notice that the defendant refused to approve of the new custom, which was not only confined to a special purpose, but, for that purpose, contemplated an unqualified contract on the part of the banks consenting to it to be bound by certifications, without regard to the presence of funds, which, if valid, could be enforced as a binding contract in cases where an ordinary certificate could not. The case in 9 Metc. 601, was evidently based upon the idea that the liability of banks upon certified checks depended upon usage or custom, and that a teller did not possess the power of a cashier in this respect. The decision was made over twenty years ago, and has not, as I am aware, been repeated by the courts of Massachusetts, although the practice of using certified checks must have prevailed there as elsewhere. It has been repudiated in this and other States, and should not at this day be regarded as the law in Massachusetts, to override a general rule of construction based upon principles of the common law, of universal application.

It is also urged that the court erred in not submitting the *bona fides* of the plaintiff's title to the jury. Ordinarily the question of good faith is a question of fact for the jury. Perhaps if a specific request to that effect had been made at the trial, it would have been the duty of the court to submit it, although, with the notice relative to the clearing house arrangement out of the way, I am unable to discern a single fact in the case tending to impeach the good faith of the Second National Bank in receiving this check. It was received in part payment for a draft of \$150,000 on Mellen, Ward & Co., and \$100,000 gold certificates which were parted with and delivered at the time; and no fact is disclosed throwing suspicion upon the transaction. But the answer to the position is that no such request was made, nor was the attention of the court called to it.

The first six requests are substantially that, as a matter of law,

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the cashier had no authority, and that there was no evidence authorizing the jury to infer it. The seventh request relates to the effect of the notice as to the clearing house arrangement, which has been already referred to. The eighth and ninth are that Jay Cooke & Co. and the plaintiff are chargeable with the knowledge of their agent; and the tenth, that the law in New York is not controlling. These requests, and the additional one asking the court to direct a verdict for the defendants, show that the defendants expected and desired the court to dispose of the case as a question of law; and, as they did not ask that any question of fact should be submitted to the jury, the general exception to the direction to find for the plaintiff is not available, upon appeal, to raise the question.

The result involves, evidently, a considerable loss from the wrongful act of the cashier; but in ethics, as well as law, the party who employed him, and clothed him with the power, should suffer the loss rather than the party who parted with his property upon the faith of the proper exercise of the power. Whenever one of two innocent parties must suffer by the acts of the third, he who has enabled such third person to occasion the loss must sustain it. 2 T. R. 70.

The judgment must be affirmed.

All concur, except ALLEN, J., not voting.

*Judgment affirmed.*

NOTE.—The present statute as to actions against National banks is substantially the same as when the above decision was made. Sec. 5198 of the Revised Statutes, as amended in 1875, reads: "That suits, actions, and proceedings against any association under this title may be had in any circuit, district or territorial court of the United States, held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

In *Crocker v. The Marine National Bank*, ante, p. 575, the Supreme Court of Massachusetts held that the language of Congress was *restrictive* rather than *permissive*, and that, therefore, an action lay against such bank, only in the city or county in which the bank was located. The above case of *Cooke v. The National State Bank*, and the case of *Crocker v. The Marine National Bank*, are, therefore, on this point directly at variance; but the Court of

Appeals went further and denied the power of Congress to deprive State courts of jurisdiction of actions against such banks.

In *Bank of Bethel v. Pahquioque Bank*, ante, p. 77 it was only held that the State courts in the city or county where the bank is located has jurisdiction of actions against such banks, and the question considered in the principal case did not arise.

In *Manufacturers' National Bank v. Baack*, ante, p. 161, the question was as to the jurisdiction of the Circuit Court of the United States.

In *Cadle v. Tracy*, ante, p. 230, it was held by the United States Circuit Court that the Supreme Court of New York had no jurisdiction of an action against a National bank located in Alabama.

In *Adams v. Dawnis*, ante, p. 510, the Supreme Court of Louisiana ruled substantially in accordance with the principal case of *Cooke v. The State National Bank*, and decided that an action would lie against the receiver

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of a National bank (and *semble* against the bank) in a parish other than that in which the bank was located and in which the receiver had his domicile.

Again on the other hand the Court of Appeals of Maryland, in *The Chesapeake Bank v. First National Bank*, ante, p. 531, held that the provision that mesne process from State courts should not be issued against National banks, was valid and constitutional and the arguments used apply as well, and were in fact applied by the court, to the provision with regard to suits against National banks in State courts.

It thus appears that on the one side

are the Supreme Court of Massachusetts, the Court of Appeals of Maryland and the Circuit Court of the United States for the Southern District of New York, holding that actions in State courts against a National bank will lie only in the city or county where the bank is located, while on the other side the Court of Appeals of New York and the Supreme Court of Louisiana hold a contrary doctrine.

See also as to actions against National banks, *Main v. Second National Bank*, ante, p. 200; *Missouri River Telegraph Co. v. First National Bank*, ante, p. 401.—REP.

## NATIONAL BANK OF CHEMUNG V. ELMIRA.

(53 New York, 49.)

*Taxation of National banks — When assessment void — Recovery back of taxes paid.*

Assessors of taxes possess no authority except such as is conferred upon them by statute, and they must see to it that they are within the authority committed to them.

Assessors assessed a tax on the capital stock of a National bank, which was expressly prohibited by statute. The property of the bank was seized by the collector of taxes and sold to pay such tax and the proceeds paid over to the municipal treasurer. *Held*, that the assessment was void and that an action lay on behalf of the bank against the municipal corporation to recover the money. (*See note*, p. 722.)

**A**CTION by the National bank of Chemung against the city of Elmira to recover money alleged to have been wrongfully taken from plaintiff and paid into defendant's treasury. The plaintiff was located in the said city of Elmira, and had a capital stock of \$100,000 invested in United States government bonds.

The assessors of defendant's city in the year 1868 assessed the bank on \$95,000 so invested and \$50,000 on real estate, and the common council of said city imposed a tax on such assessment of \$2,000.

The collector of taxes levied upon the personal property of the bank and sold it to pay such tax and also a county tax which had likewise been assessed on said bank, and paid the amount of the city tax to the city treasurer.

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The referee held that the assessors had jurisdiction and acted judicially, and that their decision could not be questioned in this action, but that the assessors' affidavit was defective and insufficient to give defendant jurisdiction to issue its warrant. He therefore ordered judgment in favor of the plaintiff, which was reversed by the Supreme Court at General Term and a judgment directed for the defendant.

*E. H. Benn*, for appellant.

*S. P. Tomlinson*, for respondent.

CHURCH, C. J. The assessment and tax against the plaintiff were void. They were made and levied not only without authority, but in violation of an express statute. Chapter 761 of the Laws of 1866 declares that "no tax shall hereafter be assessed upon the capital of any bank or banking association organized under the authority of the State, or of the United States, but the stockholders in such banks and banking associations shall be assessed and taxed on the value of their shares of stock therein."

It is undisputed that the plaintiff was a banking association, organized under the authority of the United States, and that the assessment and tax in question were upon the capital of the bank, and that the amount of the tax was compulsorily collected of the plaintiff, and paid into the treasury of the defendant. A mere statement of the case ought to be sufficient to determine it, without further elaboration; but it is due to the importance of the question, and to those entertaining other views, to advert to some of the principles governing this class of cases.

It is conceded that the plaintiff is entitled to recover, if the assessment is to be regarded as illegal, and not simply erroneous. It is claimed that the assessors had jurisdiction to make the assessment, that their act was judicial, and, although erroneous, is conclusive until reversed by a direct proceeding instituted for that purpose. This proposition cannot be predicated of this case, either in fact or in law. Some of the duties of assessors are judicial in their nature, and as to these, when acting within the scope of their authority, they are protected from attack, collaterally, to the same extent as other judicial officers; but they are subordinate officers, possessing no authority, except such as is conferred upon them by statute, and it is a well-settled and salutary rule that such officers

must see that they act within the authority committed to them. 15 N. Y. 321, and cases cited. When they have no power to act at all in a given case, either as to person or property, their acts are void. So when their right to act depends upon the existence of some fact, which they erroneously determine to exist, their acts are void. So in performing a ministerial duty their acts are void, if not in accordance with law. But having jurisdiction of the person and subject-matter, if they err in the exercise of it, they are protected. These general principles are elementary, and are abundantly sustained by authority, and if any confusion exists upon the question, it has arisen from a failure properly to apply them. This court held in 15 N. Y. 316, that if the assessors erred in determining whether a person was a taxable inhabitant of a town, they did so at their peril, and were liable to an action by the party aggrieved. This was upon the principle that the fact, although judicial in its nature, and requiring the exercise of judgment, was nevertheless necessary to confer jurisdiction, which could not be conferred by an erroneous decision. In *Whitney v. Thomas*, 23 N. Y. 281, lands owned by a non-resident were assessed to a resident of the town as resident lands. They were afterward sold by the Comptroller, and a deed given, which was held void on account of the illegal assessment. The same argument was advanced in that case as in this. SELDEN, J., in delivering the opinion of the court, said: "The supposition entertained by the counsel, that the assessors have jurisdiction in consequence of their obligation to assess all the lands in the town or ward, and that if they make due inquiries and assess according to the best information they can obtain, their action cannot be impeached in any collateral proceeding, is erroneous. \* \* \* The assessors have no jurisdiction to assess, except as the statute prescribes, and unless they pursue the directions of the statute, the assessment is unauthorized and void." In 45 N. Y. 676, we held that where the supervisors added an unpaid tax upon lands for one year to a tax upon the same lands for the next year, against a person who had in the mean time purchased, instead of returning it to the Comptroller as the statute directed, the act was void, and an action would lie against the county to recover back the money collected. *Chegaray v. Jenkins*, 5 N. Y. 376, was an action against the receiver of taxes, an officer corresponding to that of collector, for an assessment upon a building claimed to be exempt as a seminary of learning under the statute.

The court decided that the action would not lie against the receiver of taxes, within the principle of *Savacool v. Boughton*, 5 Wend. 170, but the learned judge who delivered the opinion enunciated the correct principle applicable to these cases. In speaking of the assessors, RUGGLES, J., said: "But being officers clothed with limited powers conferred by statute, their decision on a question in which their own authority to act was involved, was not for all purposes conclusive. The general principle is that the proceedings of magistrates and officers having special and limited jurisdiction must bear on their face the evidence of their jurisdiction, or they will be judged invalid, and that in collateral actions their judgment may be questioned and disregarded, if it appears that in fact they had no authority to act in a given case." *Weaver v. Devendorf*, 3 Den. 118, will serve to show the distinction between a case where the assessors have jurisdiction and where they have not. That was an action by a minister for not allowing him the statutory exemption of \$1,500. It appeared that he had more property than the amount of the exemption, and was therefore taxable. The assessors had jurisdiction to act and were not liable for making the assessment too high. BEARDSLEY, J., said: "It was, therefore, not a case in which the property of the plaintiff was totally exempt from taxation, and over which the defendants had no jurisdiction whatever, but one in which they were authorized and required by law to make an assessment of the property, even if he was a minister of the gospel." The case was properly decided upon the ground that in fixing the value of property the power exercised is judicial. In *Prosser v. Secor*, 5 Barb. 608, it was held that if it appeared that a minister of the gospel did not possess property to the amount of the exemption, the assessors had no jurisdiction of his person or his property, and could not obtain any by deciding, wrongfully, that he was not a minister, and thus confer authority on themselves. JOHNSON, J., said: "It must be quite apparent that the assessors could not, by any determination they have power to make, subject the property of any person to taxation, which the law exempts. In determining whether they have jurisdiction or not in a given case, assessors do not act judicially. No officer can acquire jurisdiction by deciding that he has it," and he cites *Weaver v. Devendorf*, *supra*, as sustaining the distinction referred to. This case, although criticised in 35 N. Y. 238, has been cited three times with approval by this

court in cases coming under my observation; in 11 N. Y. 563, by PARKER, J., in 15 N. Y. 316, by DENIO, J., and in 45 N. Y. 682, by FOLGER, J. It is not referred to now for the purpose of approval or disapproval, but to show, in connection with the general current of authority, how uniformly and inflexibly the general principles referred to have been, with slight exceptions, maintained and adhered to by the courts. In 40 N. Y. 372, an assessment in Brooklyn upon land, to the wrong person, for a street improvement, was held void, and the consideration allowed to be recovered back by the purchaser upon the same principle.

The cases of *Barhyte v. Shepherd*, 35 N. Y. 238, and *Swift v. City of Poughkeepsie*, 37 id. 511, are chiefly relied upon for the application of judicial irresponsibility to this case. The first was the case of a minister claiming exemption, and in its facts analogous to that in *Weaver v. Devendorf*, 3 Denio, *supra*. The plaintiff owned property to the amount of \$2,500, and was assessed \$1,050. The assessors had jurisdiction, therefore, to assess him for some amount, and whether they assessed him too high in consequence of not allowing the exemption, or from an erroneous valuation of his property, was immaterial. In either case their decision was conclusive within all the authorities, and the case was rightly decided. The learned judges who delivered opinions seemed to have ignored or overlooked the distinction recognized in *Weaver v. Devendorf*, *Chegaray v. Jenkins*, and *Prosser v. Secor*, and I infer intended to hold that in all cases, in determining whether property was exempt, the assessors acted judicially and are protected. The case was one also involving serious doubt whether the person claiming the exemption was a minister of the gospel, within the meaning of the statute. He was, in fact, a farmer, and worked upon a farm week days, and although he preached on the Sabbath, he had no employment and no salary. From a perusal of the opinions, it is apparent that the learned judges misapprehended to some extent the doctrine of some of the cases, and I am not prepared to assent to their reasoning, but it is quite unnecessary in this case to determine whether it is correct or not. If we assume that the case decides that assessors have jurisdiction, where the person is otherwise a taxable inhabitant, and the property otherwise taxable, and that the question of exemption is a judicial act, and that the assessors are protected for an erroneous judgment, it falls far short of being an authority against the plaintiff in this case.

Here the statute declared that certain property was not taxable. The property was specifically described. The assessors had no judgment to exercise in regard to it, and no decision to make. One of the learned judges who delivered an opinion in the case, I infer did not intend to depart from established principles upon this subject, from expressions in an opinion since delivered by him in 48 N. Y. 93, and which are appropriate to this case. In commenting upon *Whitney v. Thomas*, 23 N. Y. 281, *supra*, he said: "It was not a mere error of the assessors, but a disregard of the facts of the case. They entered a false judgment not warranted by any facts proven. It could not be called a mistake of law or fact, such as the assessors acting as *quasi-judicial* officers might honestly make. It was simply an assessment, without the slightest color to warrant or authorize it." \* \* \* "A flagrant disregard of the facts, or assessing in opposition to the clear and undisputed facts, when the application of the statute could not by any means be doubtful, might, as in the case of *Whitney v. Thomas*, present a case where the officer would be without jurisdiction."

In the other case relied upon, in 37 N. Y. 511, the assessors assessed the value of the shares of stock of the Farmers and Mechanics' National Bank to the plaintiff at their par value, although the bank held a quantity of government bonds as a part of their capital. In making this assessment, the assessors acted in strict conformity to the State law, as it existed at that time. The law was afterward declared invalid by the Supreme Court of the United States, on the ground that it conflicted with a law of Congress. It was assumed that the assessors had jurisdiction of the person and subject-matter, upon the authority of two other similar cases not reported, and the only question discussed is whether the money could be recovered of the city upon the general principle of the plaintiff's equitable right to it. The assessors acted in accordance with the State law, which was sustained by the decision of the highest court in the State. They were obliged to act, and would have been liable to indictment if they had refused. It is true that the decision of the United States court established that the State law was invalid, and in theory that the assessors had no legal justification under it, but the court might well have hesitated to hold them liable in trespass. The final decision may have established that they erred in law, but the State court would not be likely to hold a subordinate officer culpable for acting in accordance with its



own decision. Besides, if there was no special act for taxing shares of stock, the assessors might assess them against the owner under the general power to assess personal property. If so, they had jurisdiction over the subject-matter, and if they erred in assessing it at too high a rate, either because a part of the capital was invested in government bonds, or for any other reason, it was an error merely. This is confirmed by BACON, J., who, in delivering the opinion, said: "That the determination of the assessors to impose the tax, *at the rate specified* by them, was a judicial determination." At all events, the case is not an authority for protecting officers in the assessment of property contrary to an express statute, and if such a doctrine is inferable from it, I have no hesitation in saying that it should not be followed.

While there is some apparent conflict in the application of settled principles to particular cases, I am confident that no adjudged case can be found which will relieve the defendants from liability. The distinction is between an erroneous and an illegal assessment. The former is when the officers have power to act, but err in the exercise of the power; the latter where they have no power to act at all, and it does not aid them to decide that they have.

It is argued that they have jurisdiction to determine what property is taxable in the town. This is a mistake. The Legislature determines that question, and the officers have no power over it. The statute requires the assessors to "ascertain, by diligent inquiry," two things: 1. The taxable inhabitants. 2. The taxable property. Where they decide erroneously as to a taxable inhabitant it is conceded, and the *Mygatt Case*, 15 N. Y., holds that they are liable as trespassers. Why not when they err as to taxable property? The duty is precisely the same, and the power conferred in the same language. Assessors must have jurisdiction over the person and subject-matter. The person must be an inhabitant of the town, and the property must be taxable. Otherwise, the assessment is illegal and void. The Legislature has declared that the capital of National banks is not taxable property. Bank shares are not capital. 3 Wall. 573. The assessors have therefore no jurisdiction over it. In this case they exercised no judgment; there was none to be exercised. There was no dispute about the facts. There was no pretense of mistake even. They simply decided to violate the statute; and while bad faith will not be imputed, we must assume that they did so voluntarily and intention-

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ally, and yet such an act is claimed to be judicial, and therefore exempt from collateral attacks.

The remedy by *certiorari* is not adequate. It is dilatory, and rests in the discretion of the court to give it or not. It is appropriate to review erroneous assessments. Taxation for public purposes is a conceded power of government, but it must be enforced strictly according to law, or it becomes the most obnoxious means of confiscation. The rights of the citizen should be sedulously guarded and protected against the lawless imposition of burdens, and the principle involved in this case is vital to the protection of private property from the grasp of irresponsible power. The plaintiff's property has been forcibly taken from it in violation of law, and it would be discreditable to the proper administration of justice not to give an effectual remedy.

I think, also, that the deputy county clerk had no authority to take the affidavit of the assessors. The county clerk and his deputy are, with other officers, authorized to administer oaths and take affidavits, with some specified exceptions; and, except when such oaths are required to be taken by particular officers. The oath of the assessors is required to be taken before a justice of the peace of the city, which is a particular officer within the meaning of the statute.

The plaintiff can only recover the amount collected by the defendant for city taxes. The city is not liable for the amount collected by the county.

The judgment must be reversed and a new trial granted, unless the plaintiff stipulates to reduce the recovery to the amount collected by the city, and, if so modified, the judgment upon the report of the referee affirmed without costs to either party.

All concur except GROVER, J., who dissents.

*Judgment accordingly.*

NOTE.—As to when an injunction will be granted to restrain the collection of a tax, see *City National Bank v. Paducah*, ante, p. 300; *St. Louis National Bank v. Papin*, ante, p. 326.

In *Dows v. City of Chicago*, 11 Wall. 108, the Supreme Court of the United States held the collection of a tax would not be restrained on the sole ground that the tax was illegal, but that there must exist, in addition, special circumstances, such as that the enforcement of the tax would lead to a

multiplicity of suits or produce irreparable injury, or throw a cloud upon the title to real property. See, also, *Heywood v. City of Buffalo*, 14 N. Y. 534; *Susquehanna Bank v. Supervisors*, 25 id. 312; *Cook County v. Chicago, etc.*, *R. R. Co.*, 35 Ill. 465; *First National Bank v. Cook*, 77 id. 622.

In order that a tax shall constitute an incumbrance or cloud upon the title to real estate the tax must be *apparently* regular and valid, for if it appear upon the face of the proceedings that

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the tax was wholly unwarranted by law, or is for any reason void, or if one *knowing* the law—and every man is conclusively presumed to know the law—would be able to see that the tax was invalid, it is no cloud on title. *Cooley on Taxation*, 542; *Detroit v. Martin*, 34 Mich. 170; S. C., 22 Am. Rep. 512; *Peyser v. Mayor of New York*, 16 Alb. Law Jour. 283. Thus a tax under an unconstitutional law is not a cloud upon title and its collection will not be restrained nor will an action lie to recover it back if paid to prevent a sale of the land. *Detroit v. Martin*, *supra*.

It may be stated as a general principle that one who has *voluntarily* paid a tax cannot recover it back although it was illegally assessed; but that money involuntarily paid on an illegal assessment may be recovered. What constitutes *voluntary* or *involuntary* payment? A payment is not generally rendered "involuntary" by a protest of the payer (*Flower v. Lance*, 59 N. Y. 603); there must be in addition some coercion either in fact or law. Coercion in fact was defined by FOLGER, J., in *Peyser v. Mayor of New York*, *supra*, to be "that duress of person or goods where present liberty of person or immediate possession of goods is so needful and desirable as that an action or proceedings at law to recover them will not at all answer the pressing purpose." Coercion by law was defined thus: "Where a court having jurisdiction of the person and the subject-matter has rendered a judgment which is collectible in due course. There the party cast in judgment may not resist the execution of it. His only remedy is to obtain a reversal, if he may, for error in it. As he cannot resist the execution of it when execution is attempted, he may as well pay the amount at one time as at another, and save the expense of delay. It may be well to say, that if the judgment is not afterward reversed, but is invalid for any collateral reason, or the process issued upon it is illegal, payment with knowledge of the fact would, perhaps, be voluntary, which seems a sound distinction taken by EMMETT, J., in *Lott v. Sweezy*, 29 Barb.

87-92." To each case of coercion by law, as is above given, are to be added those *quasi* adjudications of inferior tribunals, such as assessors of taxes or assessments where their proceedings are regular on their face or on presentation make out a right to have and demand the amount levied, and to collect it in due course of law by sale of goods or municipal lease of real estate." Unless void on their face, they have the force of a judgment; the party is legally bound to pay, and has no lawful mode of resisting. The only remedy is a reversal of the adjudication. Until reversed, they give the collector of the tax the right to take and sell goods, and the assessment remains a *prima facie* valid lien upon real estate.

Thus where a tax was paid in order to prevent the issuing of a warrant of distress with which he was threatened and which would issue of course, unless the tax was paid, the payment was held to be involuntary. *Preston v. Boston*, 12 Pick. 7. And in *Boston Glass Co. v. Boston*, 4 Metc. 181, it was held—following the above case—that "payment of taxes to a collector who has a tax bill and warrant in the form prescribed by law, is to be regarded as compulsory payment, and if such taxes were assessed without authority, they may be recovered back in an action for money had and received although the party made no protest before payment."

In *Grim v. School District*, 57 Penn. St. 434, it was said to be settled that "a party who, when threatened with a distress, pays an illegal tax under protest and notice of suit may maintain an action to recover it back; and in *Hendy v. Soule*, Deady, 400, it was decided that when taxes are paid on demand of an officer having authority to collect them by distress, there is sufficient duress of the property to make the payment involuntary. But it is to be observed that in these cases the payment was held involuntary because the collector had authority to directly enforce his demand by levy and seizure of property.

See further as to voluntary payments, *Cooley on Taxation*, 566; *Burroughs on Taxation*, 266; *Broom's Legal Maxims*.—REP.

## VAN LEUVEN v. FIRST NATIONAL BANK.

(54 New York, 671.)

*Right of National banks to deal in government securities.\**

*Semle*, that National banks can deal in and exchange government securities.

**A**CTION to recover the value of United States securities alleged to have been delivered to defendant to be exchanged for other United States securities.

The plaintiff having on deposit with the defendant United States 7-30 notes and desiring to exchange them for 5-20 bonds, went to the bank and told Hasbrouck, defendant's president, of his desire. Hasbrouck said: "We will do it. We are doing it for a great many." Plaintiff thereupon got his 7-30 notes from the bank vault and delivered them to Hasbrouck, who gave a receipt therefor, written upon the ordinary bank letter paper, which read:

"This is to certify that I have received from C. F. Van Leuven U. S. 7-30 notes, \$10,000, which I am to exchange for same amount of U. S. 5-20 bonds and deliver to him.

"10,000."

J. H. HASBROUCK."

It appeared on the part of defendant, that before the organization of defendant as a bank, Hasbrouck was doing business as a private banker, and that plaintiff then dealt with him in reference to bonds. It also appeared that, prior to the transaction above stated, plaintiff at one time went to the bank and inquired for Hasbrouck, who was out. He then inquired of the cashier in reference to certain bonds which he said were in the bank vault, and showed the cashier a receipt signed by Hasbrouck, the precise form of which did not appear; the cashier informed him that it was the individual business of Hasbrouck, with which the bank had nothing to do.

The court, upon these facts, directed a verdict for plaintiff.

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\* In *First National Bank v. Ocean National Bank*, post, the Court of Appeals of New York said: "No general principle was decided in *Van Leuven v. First National Bank*, 54 N. Y. 671." This decision was there explained. A memorandum of the case only is given in the 54 New York Reports.

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*Held* (REYNOLDS and JOHNSON, CC., dissenting), no error; that the receipt being given as a part of the transaction and as a voucher merely, and no evidence appearing of an intent to alter the effect of what had been before said, imported simply, when read in the light of the surrounding circumstances, a transaction with the bank, and that it mattered not how Hasbrouck understood it, but the question was how plaintiff did and had the right to understand it; also *held*, that the dealings between Hasbrouck and plaintiff, before the former became defendant's financial officer, were immaterial, as was also the evidence in regard to the prior receipt.

That the business of exchanging government securities was such as a National bank, through its officers, could properly and legally engage in, was held in the prevailing opinion, and was concurred in by all.

*F. L. Westbrook*, for appellant.

*Samuel Hand*, for respondent.

EARL, C., for affirmance.

LOTT, Ch. C., and GRAY, C., concurred.

REYNOLDS and JOHNSON, CC., read for reversal.

*Judgment affirmed.*

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PLATT V. BEEBE.

(57 New York, 339.)

*Evidence of appointment of receiver of National bank*

The certificate of the Comptroller of the Currency duly made is sufficient evidence of the appointment of the receiver in an action brought by him.\*

**A**CTION by Platt, as receiver of the Farmers and Citizens' National Bank, upon a promissory note belonging to the bank.

Upon the trial the plaintiff to prove his title as receiver gave in

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\* See *Thatcher v. West River National Bank*, ante, p. 622; *Tapley v. Martin*, ante, p. 611. To the same effect, also, is *Merchants' National Bank v. Cardozo*, 3 Jones & S. 162.

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evidence a certificate of the Comptroller of the Currency approved and concurred in by the Secretary of the Treasury reciting the existence of the facts necessary to authorize him to appoint a receiver of the said bank, and appointing the plaintiff such receiver. Judgment for the plaintiff was affirmed by the Supreme Court at General Term, and defendant appealed.

*Erastus Cooke*, for appellant.

*A. M. Cunningham*, for respondent.

GRAY, C. The plaintiff's appointment to the receivership of the bank is conceded ; the validity of the appointment is questioned ; and is involved in the motion made by the defendant at the close of the plaintiff's evidence for the dismissal of his complaint, upon the ground stated, viz., that there was no evidence of the facts authorizing his appointment. The evidence of the facts consisted of a statement contained in a certificate made by the Comptroller of the Currency, under an act of Congress to provide a National currency and for its security and redemption, approved June 3d, 1864. 13 U. S. Stat. at Large, 99, § 50. By which it is simply required of the Comptroller that he be satisfied of the existence of the facts authorizing him to make such appointment ; to proceed as he did in this case, and with the concurrence of the Secretary of the Treasury, and make it. No objection was made to receiving the certificate in evidence, or that it was not evidence that the Comptroller was satisfied of the existence of the facts stated in it, but rather upon the ground that the facts alleged in it were not established by competent legal evidence on the trial, as in other *ex parte* proceedings, in which an officer, upon proof of a special state of facts, is given authority to act. These banks are located in different parts of the United States, most of them at a great distance from the city of Washington and from each other, and all under the supervision of officers residing in that city ; and among them, to a great extent, the Comptroller of the Currency, who for the purpose of protecting the public, and among them those who, confiding on the solvency of the banks, have business with them, is under the necessity of taking from such of them as fail to comply with the law, their management, and confiding them to the care of a receiver ; and sometimes, and per-

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haps often, under an emergency, when, owing to the distant location of the bank from the city of Washington, and where to a moral certainty he is satisfied that the causes exist for placing them in the custody of a receiver, when strictly legal evidence of the fact is not attainable in time to save those interested from sudden misfortune. The act, in its peculiarity of expression, is framed to meet such an emergency, and authorizes the Comptroller, when *satisfied* of the existence of a given state of facts, to make the appointment. Such words, as upon proof or evidence, indicating it to be the design of the framers of the law that it should be upon legal proof or evidence of the facts, are carefully omitted; and the Comptroller is left to be satisfied as best he can be, under the peculiar circumstances of each case, of the existence of the facts and the necessity of his action. The question whether Crawford notified the bank that the note was for the drawer's benefit, is put at rest by the finding of the referee that he did not.

It is claimed that the bank, of whose assets the plaintiff was receiver, held the note as collateral security for the payment of the sum drawn by Crawford. I do not so understand the transaction. The amount paid to him upon his drafts was on account of and against this note, left for discount, and was so much paid by the bank for the note. It was a discount of the note to the amount paid on Crawford's drafts against it. But if it was otherwise, and the note left as it was, and drawn against, was a mere pledge for the sum paid upon the drafts, the note, being commercial paper, the bank was not subject to the rule regulating the rights and liabilities of a pledgee, but is regarded as a holder for value. *Bank of New York v. Vanderhorst*, 32 N. Y. 553, 559, 560.

The judgment should be affirmed.

All concur.

*Judgment affirmed.*

FIRST NATIONAL BANK OF LYONS V. OCEAN NATIONAL BANK,  
appellant.

(80 New York, 278.)

*National bank — Liability for deposits for safe-keeping — Ultra vires.*

The cashier or other executive officer of a National bank has not, in the absence of special authority from the directors or of a usage or practice so to do, power to receive, on behalf of the bank, property for safe-keeping.

*Quere* as to the power of a National bank to become a bailee of property either gratuitously or for hire.\*

A gratuitous bailee is only liable for gross negligence; he is not bound to any special or extraordinary measures to protect the property, and the negligence with which he can be charged, or which is the proper subject of evidence, is only that which is connected with and directly contributes to the loss.

In an action against a bank for the loss of property which it had received as gratuitous bailee, *held*, that the declaration and admissions of the president, tending to show negligence on his part, made after the transaction, and when not acting within the limit of his authority, were not binding upon the bank.

**A**CTION to recover the value of United States bonds delivered by plaintiff to defendant for safe-keeping, and alleged to have been lost through the defendant's negligence.

Both the plaintiff and the defendant were banking corporations, organized under the act of Congress of 1864 (13 U. S. Stat. at Large, 99), the plaintiff being located in Lyons, Iowa, and the defendant in the city of New York.

The plaintiff's evidence tended to show that it became a depositor with defendant in consequence of a circular signed by the defendant's cashier, soliciting the accounts of the banks to which it was sent, offering to allow four per cent interest on daily balances, to pass cash items to the credit of the correspondent on day of receipt, without charge, and to buy and sell government bonds, gold and stocks, without charge. The bonds in question were received and receipted for, part by defendant's cashier and part by its assistant cashier, as held subject to plaintiff's order. A portion of them were purchased by defendant for plaintiff. Letters from defendant's cashier showed that on three occasions the coupons were, by plaintiff's directions, cut from the bonds and the proceeds

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\* See *Wiley v. First National Bank*, *post*, and note.



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credited to plaintiff's account. No charge was made against plaintiff for purchasing the bonds or collecting the coupons. Defendant's banking-house and vault was broken open by burglars, and the bonds, with a large amount of other securities and money belonging to defendant, stolen.

The further facts appear sufficiently in the opinion.

Judgment was entered on a verdict in favor of the plaintiff, which was affirmed at General Term in the Common Pleas of New York city. Defendant appealed.

*F. N. Bangs*, for appellant.

*Lucien Birdseye*, for respondent.

ALLEN, J. The point was distinctly made at the close of the plaintiff's evidence, and renewed at the close of the trial, that there was no evidence that the corporation defendant had made any contract of bailment with the plaintiff, or assumed any obligation as bailee of the plaintiff's property, and that there was no evidence that the officers of the corporation had power or authority to make, in behalf of the corporation, any contract of bailment, or assume any liability as a custodian and bailee of the securities of the plaintiff under the circumstances. This is entirely distinct from the very serious question back of it, and to be met, if this position of the counsel for the defendant is not well taken, that the defendant had not power or authority to assume the duties and obligations of a naked bailee of property, whether gratuitously or for hire, and that the contract of bailment, if one was made by or in behalf of the corporation, was *ultra vires*, and imposed no legal obligation upon the corporation as such. Or, if the power to become the bailees or depositaries of property for safe-keeping be conceded, a question may arise as to the contract implied, and the extent of the obligation assumed by the mere receipt of, and placing the property in the vaults of the bank in the absence of a special contract, in view of the special purposes for which the corporation was created, and the limited powers expressly conferred.

The bonds in question were the absolute property of the plaintiff. The defendant had no special property in them. It had no lien upon them, and they were not deposited or held as a security for or in connection with the business of the defendant as a banking corporation, or its transactions with the plaintiff, either present

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or prospective. If a bailment to the defendant, it was a simple deposit without interest in, or compensation to, the depository. It was a naked bailment of property to be kept for the bailor without recompense, and to be returned when the bailor should require it. This is the legal definition of a deposit of this character. Story on Bailments, § 4.

The relation of bailor and bailee imports a trust, and a contract, express or implied, to re-deliver the property when the purposes of the trust shall be accomplished, and the contract is supported, in the case of a naked bailment and simple deposit, by the yielding up of the present possession or custody by the bailor, upon the faith of the engagement of the bailee to re-deliver. Story on Bailment, § 2 and note 4, and cases cited. The duties and obligations of a bailee cannot be thrust upon one against his consent, but must be voluntarily assumed by the party himself, or some authorized agent, as in every obligation founded upon contract, express or implied. A corporation can only act by agents, and it follows that it cannot be subjected to the responsibilities and liabilities of a bailee, except by the acts and contracts of its agents duly authorized, or by agents acting within the scope of their general powers and apparent authority under circumstances which would estop the corporation from denying that their real was not co-extensive with their apparent authority, or that they were not authorized to exercise the powers usually delegated to like officers and agents in other corporations of the same character. There is an entire absence of evidence that it was the habit and practice of the defendant to receive special deposits and valuable property or securities for safe-keeping, or that they had done it for any other person or corporation, except in the case of O'Kell, a tenant, occupying a part of the same building, as its lessee. It would seem that he had been in the habit of depositing a small trunk, used in his daily business, in the vault of the defendant for safe-keeping over night. It was not proved that the directors, or any one of them, had ever sanctioned the receipt of special deposits of any kind for safe-keeping, or that they had any knowledge of the deposit of these securities, or of any other like deposit. If it be assumed that the circular issued by the officers of the defendant, inviting the correspondence of other banks, was known to or authorized by the directors, it presented no evidence of a consent to become a general bailee and depository for their correspondents. A proffer to buy and sell securities comes far short

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of an undertaking to act as a depositary of them, for an indefinite time, or for any time beyond that necessary to accomplish the precise agency assumed. It is one thing to act as an agent in the purchase and sale of property, and quite another and a different thing to receive it on deposit and assume the responsibilities of a bailee. The case is also barren of evidence that other banks were in the habit of receiving deposits of a like character and under like circumstances. There was no attempt to prove a general custom or usage upon the subject, even if that could have affected the liability of the defendant, or been given in evidence as tending to prove the authority of the bank officers in the premises.

Both the plaintiff and the defendant were banking corporations incorporated pursuant to the act of Congress entitled "An act to provide a National currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864, known as the "National Currency Act," and the officers and agents of each must be assumed to be familiar with the powers of the other, and the general powers and duties of its officers. The governing body of National banks is the board of directors, authorized by section 9 of the act, and such board has the management and control of the affairs of the corporation, and may do and transact any and all business within the limits of the powers conferred by the act of Congress. To the extent of the powers given by the act the directors may bind the corporation, and the shareholders, who are the constituent body; and the shareholders, who are, by section 12, made personally responsible "for all contracts, debts and engagements," of the association, to the extent of the amount of their stock therein, in addition to the amount invested in such shares. This responsibility is necessarily limited to such contracts, debts and engagements as may lawfully be made or incurred in the exercise of the corporate powers as limited and prescribed by the act of Congress. The managing officers of corporations formed under the act, those who transact the current business of the association, are appointed by the corporation, which has power to appoint them and define their duties. They are a president, vice-president, and a cashier, and such other officers as may be found necessary, but by whatever name known they only possess such powers as are delegated by the governing body, or the corporation, either in terms or by implication. Act, *supra*, § 8. There is no evidence that the powers and duties of the managing officers

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of the defendant were specifically defined by any act or resolution of the corporation or the board of directors. It must be assumed, therefore, and the public and those dealing or having business transactions with the bank had the right to assume, that they had and exercised the powers and performed the duties usually devolved upon and performed by persons occupying the same position in other banks, and such as they were in the habit of performing in the transaction of the current and ordinary business of the bank, and within this limit the corporation would be bound by their acts in the absence of proof that their powers were limited or restricted, and that such restriction and limitation was known to the person dealing with them. Story on Agency, § 114, and cases cited in notes. Whatever may be the extraordinary or incidental powers of the corporation under its charter, power to bind the corporation can only be presumed to exist in its executive agents and officers within the scope of its ordinary business and their ordinary duties. *Life and Fire Ins. Co. v. Mech. Fire Ins. Co.*, 7 Wend. 31; *Minor v. Mech. Bank of Alexandria*, 1 Pet. 46; *Hoyt v. Thompson*, 1 Seld. 320; *Leggett v. N. Y. Manf. Co.*, Sandf. Ch. 541.

The powers of the corporation defendant are banking powers only, with such incidental powers as may be necessary to carry on the business of banking, with the privilege of buying and selling exchange, coin and bullion. This does not necessarily include the business of a safe deposit company, or business of receiving for safe-keeping, and storing for hire, or without compensation, jewelry and valuables, or property of any kind. If the power exists in the corporation as part of its franchise, it is only as an incident of its principal business. The duties of the executive officer of a banking corporation, who is ordinarily the cashier, are very well understood, and while those of the president are not so well defined, he is but the executive agent of the board of directors, to perform such duties as may be devolved upon him, and is not the corporation, and cannot take the place of the governing board, and make contracts or incur liabilities outside of the ordinary business of the bank, without special authority. The corporations formed under the Currency Act are banks of deposit as well as circulation. They are authorized to issue their own notes for circulation, and to receive from others their money and circulate it. Money so received from others is termed a deposit, although it has none of the qualifications of a bailment. There is no trust or promise to re-deliver

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the same money. By the deposit the money becomes the property of the bank, and the relation of debtor and creditor is created between the depositor and the bank. *Commercial Bank of Albany v. Hughes*, 17 Wend. 94; *Marine Bank v. Fulton Bank*, 2 Wall. 252. This is the character of the deposit which, by the Currency Act, the defendant was expressly authorized to receive, and in receiving such a deposit the cashier would be acting within the scope of his authority, and the bank, by his act, would become a debtor to the depositor.

The principal attributes of a bank are, the right to issue circulating notes, discount commercial paper, and receive deposits of money. Per SPENCER, J., 15 Johns. 390; *N. Y. Firemen's Insurance Co. v. Ely*, 2 Cow. 678, 710.

The act of Congress under which the plaintiff and defendant became incorporated makes them banking corporations, and confers upon them banking powers, and all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; by obtaining, issuing and circulating notes, according to the provisions of the act. The statutory powers and franchise are entirely coincident with the attributes of banking corporations as defined by the law-merchant. The National banking associations are required, by law, to have on hand, at all times, lawful money to a prescribed amount as a reserve fund; and are permitted to "keep one-half of the lawful money reserve in cash deposits" in the city of New York, but the bonds in controversy were not, and could not have been, deposited with or received by the defendant under this provision of law. Act, *supra*, §§ 31, 32.

The deposit of these bonds cannot be distinguished from a deposit of jewelry or plate, or other valuable property, and was a special transaction not within the ordinary course and business of banking, or necessarily incident to it. If authorized, it added greatly to the risk of loss to the shareholders, without adding to their gains. It was a holding out of greater inducements to burglars and robbers from without, and might prove of greater temptation to dishonesty, on the part of clerks and employees, within the bank. As a business, it could not have been undertaken at the risk and responsibility of the corporation by the executive officers, or without the

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special authority of the board of directors, and a single transaction was without the general scope of the powers and duties of the executive officers of the institution.

*Giblin v. McMullen*, L. R., 2 P. C. Cases, 327, was an appeal from the Supreme Court of Victoria. The defendant represented the Union Bank of Australia, and no question was made as to the authority of the manager of the bank to receive the special deposit; and it is expressly said that the railway debentures, which were stolen by the cashier, were placed in the defendant's care by a customer, in the ordinary course of their business as bankers. The case turned upon the liability of the bailee for a theft by the officers of the bank, and the court, following *Foster v. Essex Bank*, 17 Mass. 479, held the defendant not liable. *Foster v. Essex Bank* was a special deposit of coin, and the bank was held to be the depository, rather than the cashier or other officers, although not held liable in the action, on the ground of a general recognition and authorization of the practice by the directors; and PARKER, C. J., places the responsibility of the defendant solely on that ground, and applying the principles of master and servant, and deducing the relation of bailor and bailee, says: "Not so, if the servant secretly, and without the knowledge, express or implied, of the master, he not having authorized or submitted to the practice, receives the goods for such purpose, for no man can be made the bailee of another's property, without his consent; and there must be a contract, express or implied, to induce a liability. The knowledge and permission, expressly found or legally to be presumed in this case, establishes a contract between the parties."

*Scott v. National Bank of Chester*, 72 Penn. St. 471 (*post*), followed the case last cited, in principle. A case very analogous to, if not in all respects like this in principle, was *Lloyd v. West Branch Bank*, 15 Penn. St. 172, and it was adjudged that the cashier had no authority to receive, as a special deposit, a sealed package of small notes, issued by a corporation, without authority of law, and that if so received, without the permission of the directors, or their knowledge of any usage or practice to receive such packages on deposit, the law would not imply a contract on the part of the corporation with the depositor for the safe-keeping of the package. COULTER, J., says, that "it was never designed by the provisions of the statute that the bank should be converted into a kind of pawnbroker shop." The case turned upon the point

as expressed by the court, that there was "no evidence that the bank made any contract with Oliver (the depositor), express or implied." The whole tenor of authority is in favor of holding corporations for the acts of their officers, especially executive officers and general agents within the general scope and apparent sphere of their duties, and not holding them for acts done without special authority in the cases without such general scope and sphere of duty. The cases are all reconcilable and sustainable on this principle and no other. Courts and judges have spoken cautiously on the subject, but the language has been uniform, limiting the responsibility of corporations for the acts of their officers and agents, in the absence of an express authority to do the particular act, to those performed in the discharge of their ordinary duties in the usual course of business, and within the sphere and scope of such duties. Such are presumed to be by authority of and within the knowledge of the directors; and within the rule are included such acts as are shown to have been performed with the knowledge and implied consent of the directors, although out of the line of ordinary duty and usual course of business. The duties of the cashier are well understood, and as recognized judicially are restricted to the care and management of the property and fiscal concerns of the bank, in the conduct of its business as a bank, in the usual and ordinary way. Story on Agency, §§ 114, 115; *Badger v. Bank of Cumberland*, 26 Me. 428; *Merchants' Bank v. State Bank*, 10 Wall. 604; *Bank of Genesee v. Patchin Bank*, 3 Kern. 309. The president and cashier of a bank cannot assign the choses in action of the corporation to its creditors as a security for the payment of a precedent debt, without authority from the board of directors. They can do no act outside of their ordinary duties in the conduct and management of the banking business, unless by authority, either express or implied, from the fact that they have been permitted to do the like acts without objection. *Hoyt v. Thompson*, 1 Seld. 320. Judge WAYNE, in *United States v. City Bank of Columbus*, 21 How. (U. S.) 356, says: "The court defines the cashier of the bank to be an executive officer by whom its debts are received and paid, and its securities taken and transferred, and that his acts, to be binding upon a bank, must be done within the ordinary course of his duties. His ordinary duties are to keep all the funds of the bank, its notes, bills and other choses in action, to be used from time to time, for the ordinary and

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extraordinary exigencies of the bank. He usually receives directly or through the subordinate officers of the bank, all the money and notes of the bank, delivers up all discounted notes and other securities when they have been paid, draws checks to withdraw the funds of the bank when they have been deposited, and, as the executive officer of the bank, transacts most of the business." After this summary of the duties and powers of the cashier, the same judge says that he may not make any contract involving the payment of money not loaned in the usual or customary way, or purchase or sell property, or create an agency of any kind for the bank unless expressly authorized by those to whom has been confided the power to manage the business of the bank, both ordinary and extraordinary. Judge STORY limits the authority of bank officers to bind the corporation to acts and contracts within the ordinary sphere of their duties, and the scope of the ordinary business. *Minor v. Mech. Bank of Alexandria*, 1 Pet. 46, 70; *Fleckner v. Bank of United States*, 8 Wheat. 338; see, also, *Fulton Bank v. New York and Sharon Canal Co.*, 4 Paige, 327. The doctrine of estoppel may give effect to the acts of the officers of a corporation as against the corporation, as in other cases of principal and agent. *Farmers and Mechanics' Bank v. Butchers and Drovers' Bank*, 16 N. Y. 125. But there is no question of estoppel in this case.

A class of cases was cited by the learned counsel for the plaintiff which do not very directly bear upon the question under consideration. They are those in which a statutory power has been conferred and has been executed, apparently within the terms and in the manner and by the agents prescribed by statute, and a presumption has been allowed in favor of validity of the execution of the power in favor of those who have in good faith acted upon the apparent compliance with the statute and the terms of the grant. The cases are circumstantially different, but all may be brought within one general principle, and they do not conflict with the views before advanced. *Commissioners of Knox County v. Aspinwall*, 21 How. 539; *Royal British Bank v. Turquand*, 5 E. & B. 248; S. C., 6 id. 327; *Society for Savings v. City of New London*, 29 Conn. 174; *Commonwealth v. Pittsburgh*, 34 Penn. St. 496; *Farmers' L. and T. Co. v. Curtis*, 3 Seld. 466, are among the cases cited by counsel, and illustrate the principles governing all. They do not touch the principle upon which this branch of the present appeal rests.

No general principle was decided in *Van Leuven v. First National*



*Bank of Kingston*, 54 N. Y. 671 (*ante*, p. 724). By a divided court it was held that the contract in that case, under the peculiar circumstances, was the contract of the corporation, and not the individual contract of the president. The question now under consideration was not considered by the learned commissioner, and does not appear to have been made in the action.

It was very earnestly and ably urged upon the court by the counsel for the plaintiff that the corporation was liable as a wrong-doer or *tort feasor* within the principle of *Philadelphia, Washington and Baltimore Railroad Company v. Quigley*, 21 How. (U. S.) 202, and other cases which were cited, in which the doctrine was applied under different circumstances. The difficulty with this argument is, that there was no wrong by the corporation, and could be none, if there was no contract. If there was no bailment to the corporation it neglected no duty, and was guilty of no negligence. The whole duty of a bailee rests upon contract, and if there was no contract there was no duty. Neither a corporation nor individual can be called upon to pay that which he or it does not owe, and neither is responsible for want of care or for neglect in protecting property of which he or it has not assumed the custody, or any relation of duty or trust in respect to it.

Having arrived at the conclusion that if the power of the corporation to assume the position of bailee, with its responsibilities and obligations, be conceded, there was no evidence of the delegation of the power to the executive and ministerial officers of the bank, and that for that reason the judgment should be reversed and a new trial granted, it is unnecessary to consider the question back of it as to the power of the corporation itself in that direction. It is a question not free from difficulty, but can be more satisfactorily considered when it becomes (if it shall) necessary to a judgment.

The public are interested in restraining corporations to the enjoyment of the precise franchise granted, and the exercise of the powers expressly conferred, and the incidental powers essential to the express power. Shareholders are also interested in keeping their trustees, the governing boards, within the limits of the delegated power with which they are clothed. It is axiomatic that a corporation can make no contracts and do no acts except such as are authorized by its charter, either expressly or as incidental to its existence. Corporations necessarily depend, both for their

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powers and the mode of exercising them, upon the construction of the statute which gives them life and being. Whether the receipt of goods and securities on deposit for safe-keeping is within the powers, express or implied, of National banks, will not be considered. The case has been considered as one of gratuitous bailment, as that was the theory upon which it was tried. If any other relation existed between the parties in respect to the bonds than that of bailor and bailee without compensation, or any other obligation or liability rested upon the defendant other than that which would result from such relation, it must be developed on another trial.

Since writing the above the case of *Wiley v. First National Bank of Brattleboro*, recently decided by the Supreme Court of Vermont (see *post*), has come to my notice. That learned court held that the cashier of a National bank has no power to receive special deposits in behalf of the bank for the accommodation of the depositor, or to bind the bank to any liability or any express contract accompanying, or any implied contract arising out of, such taking, and the judgment is sustained by a well-considered opinion of Judge WHEELER. In his views I fully concur.

Several exceptions were taken at the trial to the admission and exclusion of evidence, some of which we think were well taken. The defendant was a gratuitous bailee, that is, a depository without compensation for the benefit of the bailor, and was, therefore, only liable for gross negligence, which is defined in various ways. The term itself has been quarreled with, but it still has a place in the law, and must have, so long as the measure of liability implied by the term is recognized, and until some better term can be invented to give expression to it. It is incapable of precise definition, and its application and use may lead, in some cases, to results unsatisfactory; but that comes as directly from the nature and extent of the duty in the particular case, as from the phrase by which a breach of the duty is expressed. I cannot but think that, in this case, the defendant was held to a higher standard of obligation than the circumstances warranted, but the question is not before us. What constitutes gross negligence, that is, such want of care as would charge a gratuitous bailee for loss, must depend very much upon the circumstances to which the term is to be applied. It has been defined to be the want of that ordinary diligence and care which a usually prudent man takes of his own property of the like description. *Giblin v. McMullen, supra*. This

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definition is given by a reference to the degree of care, rather than the degree of negligence, which may be the easier and more intelligible mode of defining the extent of the obligation, and the measure of duty assumed. Ordinary care, as well as gross negligence, the one being in contrast with the other, must be graded by the nature and value of the property and the risks to which it is exposed. A depositor of goods or securities for safe-keeping with a gratuitous bailee can only claim that diligence which a person of common sense, not a specialist or expert in a particular department, should exercise in such department. Wharton on Negligence, § 470. The bank, as depositary, taking no pay and taking no risks, was not bound to resort to any special or extraordinary measures to protect the property of the depositor, and the negligence for which it could be charged, or which was the proper subject of evidence upon the trial, was only that which was connected with, and directly contributed to the loss. Independent acts of negligence, disconnected with the loss, were not properly admissible in evidence. *Scott v. National Bank of Chester Valley, supra.*

The defendant was not chargeable with negligence or want of care for not acting upon facts or circumstances not coming to the knowledge of its directors or officers. Facts not brought home to them, tending to show that the property was exposed to loss from some unusual cause, to some peril growing out of peculiar circumstances, were not admissible in evidence against the defendant. The bailee was only called upon to take such care as became necessary to protect it against risks known to it, or of which it had notice. There was great latitude in the evidence on the part of the plaintiffs, and some of it was quite dramatic in its character; the purpose and end was to show that the place of deposit was peculiarly and extraordinarily exposed to perils from robbers at that time, calling for more than the usual cautions from the bailee. This was competent, so far as facts and circumstances proved to exist were communicated to the officers of the bank, but no farther. Without stopping to inquire whether all the evidence of this character was competent, or whether all the facts, which, if known, might have alarmed the officers of the bank, and stirred them up to greater diligence, were made known to them, I will refer to a single exception which is fatal to the recovery. The plaintiff was permitted to prove a conversation between one Holley and the president of the bank, immediately after the robbery, in

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which the president, Mr. Martin, was made to say, "For God's sake and mine, never make mention of any conversation that has ever passed between you and me, in relation to the robbery of this bank." Holley had testified to several prior conversations, in which he claimed to have made known to the president some attempt by burglars to enter the bank building, and of indications of an intended robbery, and urged upon him the necessity of greater precautions. The admission of the evidence which formed the subject of the exceptions is sought to be justified as the act of the defendant, by its authorized agent, to suppress testimony, to conceal and cover up evidence. The statement or request, if made by Mr. Martin, was only material as an implied admission of culpable negligence on his part, that which would subject him to censure, and, perhaps, loss of place; and if this deposit was in his mind, possibly charge the bank with its value. That it was in the mind of Martin, or that he intended to suppress, or foresaw the necessity of suppressing evidence in any action in a court of justice, there is not the least evidence. The request was made, doubtless, if made at all, to save himself and his acts from criticism, and for no other purpose; and it was only important as an admission, by implication, of neglect in protecting the bank against the robbery. If made for the purpose suggested, it was not an act by the corporation. He did not, in that conversation, although he may have supposed he was acting in the interest of the bank, represent it. He had no authority to speak or act for it, and it could not be affected by its acts and declarations made after the transaction, and when not acting within the limit of his authority, or in respect to a business over which he had authority to act for the bank. He had no incidental authority to make any declaration, binding upon the bank, in matters not within the scope of his ordinary duties. Story on Agency, § 115. An authority to speak and act for the corporation, in respect to litigations not pending or even anticipated, cannot be presumed. As a mere declaration or admission, tending to prove the fact in issue, it was not admissible, and should have been excluded. There is no principle upon which its admission can be sustained, and it should have been excluded. *Luby v. Hudson Riv. R. R. Co.*, 17 N. Y. 131; *Hamilton v. N. Y. C. R. R. Co.*, 54 id. 334; *Packet Boat Co. v. Clough*, MS. opinion of Judge STRONG, U. S. Sup. Ct., Oct. 7, 1874.

The declarations of agents are only admissible when made as

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part of the *res gestæ*, or in the performance of the duties of their agency.

The judgment must be reversed, and a new trial granted.

RAPALLO and ANDREWS, JJ., concur ; all the other judges concur in result.

*Judgment reversed.*

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 HINTERMISTER V. FIRST NATIONAL BANK.

(64 New York, 212.)

*Usury by National banks — Action for penalty — Amount of recovery.*

In an action against a National bank to recover the penalty imposed by the act of Congress for taking a greater rate of interest than is allowed by law, the plaintiff is entitled to recover only twice the amount taken in excess of the legal interest, and not twice the amount of the entire interest paid.\*

In an action to recover the penalties imposed for taking unlawful interest, the plaintiff is entitled to recover twice the amount he has paid for usury within two years prior to the commencement of the action, whether the amount was paid in one or several payments.

*Semble*, that the "forfeiture of the entire interest" imposed for taking illegal interest is enforced only in actions brought upon or to enforce the usurious contract.

**A**CTION by Hintermister against the First National Bank of Chittenango, to recover, under section 30 of the National Banking Act, twice the amount of interest upon a note and the renewals thereof, on the ground of usury. The court found as facts, that the interest charged was in excess of that allowed by the law of this State and the act of Congress, and that such excess was twenty dollars in addition to the interest secured upon the note and upon such renewal thereof. The court ordered judgment for twice the amount of the entire interest paid upon these renewals, and twice the twenty dollars paid in excess upon the last renewal. This judgment was reversed by the General Term (5 T. & C. 484) and a new trial ordered.

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\* See *Brown v. Second National Bank*, *post*; but see also *Overholt v. National Bank*, *post*, wherein *Brown v. Second National Bank* is explained and limited.

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Hintermister v. First National Bank.

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*W. E. Lansing*, for appellant.

*D. D. Walrath*, for respondent.

ALLEN, J. The Supreme Court of the United States having given an interpretation to the act of Congress regulating the interest which may be lawfully taken by National banks, and declaring the penalties for demanding or receiving interest at a greater rate than that allowed by law, adverse to the views of this court, as expressed in *The National Bank of Whitehall v. Lamb*, 50 N. Y. 95, neither that case nor that of *The Farmers' Bank of Fayetteville v. Hale*, 59 N. Y. 53, can be longer considered as furnishing a rule for decision in cases within the principle of the adjudication by the Federal court. The decisions of that court in all matters of Federal jurisprudence and of the interpretation of the acts of Congress, are paramount to and binding upon all other courts.

The judgment in *The Farmers' Bank of Fayetteville v. Hale* was a necessary sequence of that in the case of *Lamb*, the statute of the State being in all respects a transcript of the act of Congress, and both received the same interpretation. But by the authoritative decision of the court at Washington, the act of Congress receiving a different interpretation from that which we thought it would bear, it follows, that in order to give effect to the evident intention of the Legislature of this State, the statute enacted in 1870 to put the State banks upon an equality with the National banks, should have the same interpretation and effect as is given to the act of Congress. Any other interpretation would do violence to the clearly expressed will of the Legislature, do injustice to the State institutions, and give undue effect to the legislation of Congress so far as it is hostile to the State banks. Both cases may, therefore, be regarded as overruled.

The plaintiff was, upon the facts found by the trial court, entitled to a judgment for the penalty given by the act of Congress, when a greater rate of interest than is allowed by law has been actually paid (U. S. R. S., § 5198); and the sole question is whether the penalty should be twice the amount of the entire interest paid or twice the amount of the excess of legal interest only. The language of the statute is not so explicit as to render its interpretation free from difficulty. The clause under which this action is brought is penal in its character, and therefore should be strictly

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construed ; that is, not extended by implication so as to give a greater penalty than that which the terms of the act will clearly warrant. The first clause of the section forfeits the entire interest whenever interest greater than is allowed by section 5197 is either received or reserved ; but it would seem that this forfeiture attaches, and is enforced only in actions brought upon or to enforce the usurious contract. It limits the right of the recovery by the plaintiffs in such actions to the money actually loaned without interest. The other clause of the section, in declaring the penalty which a party paying the illegal interest may recover, employs different language. It enacts that "in case a greater rate of interest has been paid" than allowed by law, "twice the amount of the interest thus paid may be recovered from the association taking or receiving the same." The language of the act is satisfied by restricting it to the interest paid in excess of the legal rate. It seems to have respect to "the greater rate" as distinguished from the entire interest mentioned in the first paragraph of the section. "The greater rate" does not necessarily include the legal rate of interest, and when the statute declares that twice the amount of the interest "thus paid" may be recovered, it may well be held to mean twice the amount paid as for "the greater rate" that is in excess of the lawful interest. With great hesitation I incline to favor this interpretation of the penal clause under consideration. I am the more inclined to this view of the statute by reason of the general character of the legislation of Congress in respect to National banks. If these institutions are not, as is said in *Tiffany v. Nat. Bk. of Missouri*, 18 Wall. 409 (*ante*, p. 90), "National favorites," they have been greatly favored by Congress to the prejudice of the State banks, and it cannot be supposed that Congress would impose very stringent burdens or very heavy penalties upon them in matters in respect to which they might come in conflict with State banks. The policy of the legislation by Congress, as intimated in *Tiffany v. Bank of Missouri* (*supra*), was to give advantages to National banks over their State competitors. In this view of the policy of Congress the lower penalty must be assumed to have been intended in the use of the ambiguous phrase of the statute. When the act forfeits the entire interest, the forfeiture is only of the one sum reserved as interest ; while, in giving penalty of twice the amount, the usurious interest only is double. If this is not so, the borrower would be the gainer by paying the usurious

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interest, and suing at once to recover twice the amount, while by resisting payment he could only save the one sum. The Supreme Court of Pennsylvania have given the same interpretation to the act of Congress, in *Brown v. Second Nat. Bank of Erie*, 72 Penn. St. 209 (see *post*\*). The judgment of the court below should have been a mere reduction of the recovery at Special Term to the amount to which the plaintiff was entitled in accordance with these views. It is objected that but one penalty can be recovered in a single action. The authorities to which reference is had in support of this objection (*Sturgess v. Spofford*, 45 N. Y. 446; *Fisher v. N. Y. C. and H. R. R. Co.*, 46 id. 644), and other cases to which reference might be made, were decided upon the peculiar language of the acts giving the penalties. The act of Congress under which this action is brought regulates the recovery by the amount illegally received and taken, and does not give a fixed sum as an arbitrary penalty, and the party entitled to maintain the action is entitled to recover within the terms of the act twice the amount which he has paid for usury within two years prior to the commencement of the action, whether the amount has been paid in one or several payments.

The order of the General Term of the Supreme Court should be modified and the judgment of the Special Term reversed, and a new trial granted, costs to abide the event, unless the plaintiff stipulates to reduce the recovery to \$160 for the penalty; and in case he so stipulates, the judgment to be affirmed for that amount, without costs to either party in this court.

All concur.

*Judgment accordingly.*

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\* See, however, *Overholt v. National Bank*, *post*.



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Crocker v. Whitney.

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## CROCKER v. WHITNEY.\*

*Mortgage to National banks.*

National banks cannot take mortgages on real estate to secure future advances.†

**A** PPEAL from an order of the General Term of the Supreme Court affirming an order of the Special Term disposing of moneys arising from a mortgage foreclosure.

*Wm. C. Watson*, for appellant.

*M. H. Peck*, for respondent.

ANDREWS, J. The National Bank of Genesee, on the 12th day of January, 1871, when the mortgage from Whitney to the bank was executed, held his indorsed paper, which it had previously discounted for him, to the amount of \$3,200. The mortgage was given to secure the indebtedness, and also any debts of the mortgagor to the bank thereafter contracted.

It is conceded that the mortgage was a valid security for the notes of Whitney held by the bank at its date, but it is claimed, and the referee has found, that these notes were subsequently paid, and unless the bank is entitled to have this finding set aside, its right to the surplus money arising on the sale under the judgment in this action will depend upon the question of the validity of the mortgage, regarding it as a mortgage to secure future loans or discounts, under the provisions of the act of Congress known as the National Bank Act of June 3, 1864.

If valid in that view, the right of the bank to priority of payment out of the fund is conceded, but the respondents, who are mortgagees of Whitney subsequent to the bank, contest the validity of the bank mortgage as a security for future liabilities, and reposing upon this claim and the finding of the referee, that the debts owing by Whitney to the bank at the date of the mortgage have been paid, they insist that, disregarding the debt subsequently

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\* Not yet reported in the New York Reports.

† See *Woods v. People's National Bank*, post, and note.

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incurred and now owing by Whitney to the bank, they are entitled to have the surplus money applied upon their mortgage, and that the claim of the bank thereto should be rejected.

The appellant claims that the finding that the indebtedness of Whitney to the bank at the date of the mortgage has been paid is not sustained by the evidence, and that in fact it entered into and forms a part of the debt of \$5,160.10 now owing by Whitney to the bank, represented by his note for that amount, of June 18, 1874, and they further claim that if the original debt is regarded as paid, the mortgage nevertheless is an authorized and valid security, under the National Bank Act, for the debt of Whitney to the bank, incurred after it was executed.

We are of opinion that upon the facts proved the notes of Whitney, held by the bank when the mortgage was given, were paid, and the referee was amply justified in his conclusion upon that question.

Whitney was a miller, and manufactured flour for sale. He was a dealer with the bank. The bank discounted his notes and passed the proceeds to his credit on its books. He drew drafts on his customers, which the bank received and credited to him, and he deposited in the bank money received in his business. The items of credit and debit were entered in a single account, and it was the usual, and, so far as appears, the uniform practice, that when his notes matured they were charged in his account and afterward surrendered. The notes held by the bank January 12, 1871, according to the usual custom, were not protested, but as they matured were charged to his account, and were afterward surrendered, and his credit on the books of the bank, made up of this blended fund, derived from discounts, drafts and deposits, was in consequence reduced to the extent of the paper charged against it.

There was no indorser on the notes discounted after January 12, 1871. They were discounted on the credit of Whitney and in reliance on the mortgage. The debit side of the account from January, 1871, to August, 1874, amounted to \$171,175.82, and the credits to \$168,237.51.

It is, we think, a clear proposition, in view of these facts, that the notes held by the bank in January, 1871, were paid. The credits to Whitney were applied to the payment of the notes as they matured. There is no other inference to be drawn from the acts of the bank. If the notes were not deemed to be paid, why were

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the indorsers discharged and the notes given up. It was not the case of a mere renewal of notes. The transaction does not differ in legal effect from what it would have been if Whitney, having funds in the bank, had as each note matured drawn his check upon the bank for the amount and delivered it to the bank and the bank had received it and charged it to his account and then surrendered the not

We deem it unnecessary to consider the rule for the application of payments, when neither party have made the application. In this case, there was by force of the transaction and the manner of keeping and dealing with this account, an appropriation of the credits *pro tanto* to pay the maturing notes by the consent of both debtor and creditor and this in law was payment. The consent is inferable from the manner in which the business was conducted. There is no ground for the inference that the bank intended to keep alive the debt existing when the mortgage was given, for it was evident that it relied upon the mortgage as a valid security for the final balance of the account and for debts which might be contracted after its execution, as well as those existing at that time. We conclude, therefore, that the finding of the referee, that the bank debt owing by Whitney when the mortgage was given was afterward paid, cannot be disturbed. See *Clayton's case*, 1 Mer. 608; *Truscott v. King*, 6 N. Y. 147.

We come then to the only remaining question in the case, viz.: Whether National banks are prohibited by the act of June 3, 1864, from taking a mortgage on real estate as security for loans or discounts which the bank may thereafter make to the mortgagor. The business of a banking corporation necessarily involves the making of contracts, the loaning of money and the existence of the relation of creditor and debtor between the bank and its customers. A corporation has incidentally at common law, in the absence of any restriction imposed by its charter or implied from the nature and object of the incorporation, the power to take and hold real estate and may deal in respect to it to the same extent as a natural person. 2 Kent, 281; *Ang. & Ames on Corp.*, § 145. A banking business or trading corporation having the right to make contracts and to become creditors may secure their debts by taking a mortgage on real estate or in any way provided for by the convention of the parties and we see no reason to doubt that a bank, unless restrained by its charter, may take a mortgage in advance to secure anticipated

liabilities, as well as those existing at the time. This is a convenient and ordinary method, when a continuous dealing upon credit is contemplated, of securing the final indebtedness. But the Legislature, by whose fiat the corporation exists and whose creation it is, may prescribe and regulate the mode of its operation and in what manner its powers shall be exercised. It may by special restrictions in the charter define and limit the incidental powers which the corporation shall possess, and so far as this is done the statute and not the common law will determine what their powers are. *Bank of U. S. v. Partridge*, 12 Wheat. 64; *Head v. Prov. Ins. Co.*, 2 Cranch, 127.

It follows from this familiar doctrine in respect to the powers of corporations, that in the absence of any restriction in the National Bank Act upon the power of the National bank to take mortgages on real estate to secure future loans or discounts, the power to do so cannot be successfully challenged, and those who deny that the power exists must show that its exercise is prohibited or restrained by the statute under which the banks are organized.

We come then directly to the consideration of this question.

The 8th section of the National Bank Act specifies the banking powers of institutions organized under it, viz.: "to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security, and by obtaining, issuing and circulating notes according to this title," and they are especially authorized to exercise all such incidental powers as shall be necessary to carry on the business of banking. The words "personal security" used in the section are manifestly, we think, used in contradistinction to real security, and define the description of securities upon which loans by National banks are to be made. Loans upon individual credit, or upon the pledge or security of personal property, are within the description, but a loan made upon a real estate mortgage is a loan upon real security, whether the mortgage is regarded as conveying to the mortgagee an estate in the land, as in some of the States, or as creating a lien simply to be enforced by foreclosure and sale as in this. This specification of the banking powers of National banks is very similar and nearly identical with the specification in the General Banking Law of this

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State of 1838. It differs in this. Under our State law among other powers specified was this "loaning money on real and personal security." The change in the National Bank Act, which was framed doubtless with knowledge of the provisions of our State law, is significant of the intention of Congress to restrict National banks to loaning upon personal property as distinguished from real security.

If the argument upon the point we are considering rested solely upon the language of the 8th section of the National Bank Act it might be strongly pressed that the authority to loan on personal security being specified, a prohibition was implied against loaning on real estate security, and that upon this ground alone the mortgage in question could not be held a valid security for Whitney's debt to the bank, contracted after the mortgage was given. Upon this point the language of Chief Justice THOMPSON in *The People v. Utica Ins. Co.*, 15 Johns. 383, where the point was, whether the insurance company could under its charter exercise banking powers, is very suggestive. He says: "The specification of certain powers (in a charter) operates as a restraint to such objects only, and is an implied prohibition of the exercise of other distinct powers." And in *New York Firemen's Ins. Co. v. Ely*, 2 Cow. 300, SUTHERLAND, J., referring to the claim that the company was not prohibited from investing its surplus funds in loans upon promissory notes, said: "The 16th section of the act expressly provides that it shall be lawful for the corporation to invest their capital, or any portion of it, either in the stock of the United States, or of the individual States, thus by the strongest implication prohibiting any other mode of investment, and destroying the inference which might have resulted from the absence of all regulations on the subject."

But we are not required to decide in this case whether the taking of a mortgage by a National bank to secure future loans is prohibited by the true construction of the 8th section of the act, standing alone, but a reference to the 28th section of the act, in connection with the 8th section, makes it very clear that it was the intention of Congress to prohibit the taking by a National bank of a real estate mortgage for that purpose. That section is as follows: "It shall be lawful for any such association to purchase, hold and convey real estate for the following purposes and for no other: First, such as shall be necessary for its immediate accommoda-

tion in the transaction of its business; second, such as shall be mortgaged to it in good faith by way of security for debts previously contracted; third, such as shall be conveyed to it in satisfaction of debts previously contracted in the course of its dealings; fourth, such as it shall purchase at sales under judgments, decrees or mortgages held by the association, or shall purchase to secure debts due to it. But no such association shall hold the possession of any real estate under mortgage, or the title and possession of any real estate purchased to secure any debts due to it for a longer period than five years."

It is apparent on reading this section that it was the intention of Congress to enable National banks to acquire real estate for a bank building and accommodations, and in payment of, or to secure debts existing when the title was acquired, and to prohibit them from purchasing or holding lands under any other circumstances.

The second specification must be construed as prohibiting the taking of a mortgage as a security except for debts previously contracted, *i. e.*, contracted before the mortgage was given. It has no other reasonable or sensible meaning, and this meaning is in harmony with the general object of the section, which was to prevent National banks from having their capital tied up in real estate investments or securities. The usefulness of the bank in aiding the business of the country depends to a great extent upon the mobility of their capital, and the readiness with which it can be turned and employed in aid of commerce, and the dangers to which, in the view of Congress, the banking system would be exposed by an unlimited power to the banks to loan their funds on real estate securities, may have led to the prohibition in question. The closing paragraph of the section indicates also perhaps a mortmain policy as in the view of Congress, although I apprehend the limit of five years, beyond which the banks are prohibited from holding real property as mortgagee in possession, or the title to purchase to secure debts due to them, was mainly designed as an additional guard against the withdrawal of bank capital from active use, and locking it up in real estate.

The suggestion that a bank by taking a mortgage on lands in this State is not a holder of the lands mortgaged and has no estate therein, and is therefore not within the prohibition against holding lands by mortgage to secure future loans, is specious, but not, we think, sound. The intention of Congress in passing the Bank Act was to provide for the creation of banking corporations throughout

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the Union with uniform organization and powers. It was not intended to allow National banks in any State to take mortgages to secure future loans, and to prohibit banks in another State from doing so, depending upon the nature and character of a mortgagee's interest in the land so defined by the laws of different States. The bank becomes a holder of real estate by taking a mortgage thereon within the true meaning and intendment of the 28th section of the act.

Having reached the conclusion that the National Bank of Genesee was prohibited from taking a mortgage of real estate except to secure a pre-existing indebtedness, the further conclusion seems to follow that the mortgage from Whitney cannot be enforced. It was not, at the time of the sale upon which the surplus moneys were realized, a subsisting valid lien upon the land, and as the equity of redemption was not bound by the mortgage, the bank had no claim upon the surplus moneys.

It is perfectly well settled in the law that the courts will not enforce a contract, the subject-matter of which is either *malum prohibitum*, or *malum in se*.

A contract made in violation of a statute is void, and it is immaterial that it is not so declared in the statute itself. The law adjudges it to be so, and courts do not undertake to pass upon the wisdom of the policy of the Legislature in enacting prohibitory statutes. Our attention has been called to the case of *The Silver Lake Bank v. North*, 4 Johns. Ch. 370.

The statute under consideration in that case, as the chancellor construed it, did not prohibit the taking of the mortgage of the bank. There is no room, we think, in this case to doubt upon the language of the Bank Act, that it was the intention of Congress to prohibit banks taking a mortgage on lands to secure future advances, and this being so, a security taken for such a purpose is void within numerous authorities. *North River Ins. Co. v. Lawrence*, 3 Wend. 482; *Life and Fire Ins. Co. v. Merchants' Ins. Co.*, 7 id. 31; *New York Ins. Co. v. Ely*, 2 Cow. 678; *Bank of Salina v. Alword*, 31 N. Y. 472, and cases cited.

The construction we have given to the 28th section of the National Bank Act is supported by the following cases: *Fowler v. Scully*, 72 Penn. St. 456 (*post*); *National Bank v. Rowell*, 2 Dill. C. Ct. R. 371 (*ante*, p. 264); *Ripley v. Harris*, 3 Biss. C. Ct. R. 190.

The order should be affirmed.

"All concur. RAPALLO, J., not voting; FOLGER, J., absent."

PEOPLE *ex rel.* TRADESMEN NATIONAL BANK v. COMMISSIONERS OF  
TAXES AND ASSESSMENTS.\*

*Taxation — Rate of, how determined in New York — Deduction for real estate.*

In assessing shares of stock in National banks in New York, the assessors must determine the actual value of the shares — taking into consideration all the capital of the bank, whether surplus or in real estate or otherwise, and then deduct from such value, such sum as represents the proportion which the assessed value of the real estate bears to the assessed value of the entire capital.†

Thus, the capital of a National bank was \$1,000,000, and was represented by 25,000 shares of \$40 each. The assessors assessed the shares at \$56 each, making in the aggregate \$1,400,000, and the real estate at \$200,000. *Held*, that they should deduct from the assessed value of each share \$8, being one-seventh or the proportion which the real estate bore to the aggregate assessed value of the shares.

**A** PPEAL from the order of the General Term of the Supreme Court modifying an assessment. The case was reported below in 9 Hun, 650.

*Hugh L. Cole*, for appellants.

*Horace Barnard*, for respondents.

MILLER, J. The relator claims relief upon the ground that the commissioners of taxes and assessments did not obey the mandate of the statute in making the proper deduction from the value of each share of the capital stock of the bank as the law required. The capital of the bank was \$1,000,000, and was represented by 25,000 shares at \$40 a share. The commissioners valued the shares

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\* This case will appear in 68 New York Reports.

† See *People v. Commissioners of Taxes and Assessments*, *ante*, p. 130, which is an affirmation of the decision of the Court of Appeals in the case of *People ex rel. Gallatin National Bank* mentioned in the following opinion. See, also, *Hepturn v. The School Directors*, *ante*, p. 113.

In the *Matter of The Farmers' National Bank of Hudson*, 1 Thomp. & C. 383, it was held that, in the absence of proof to the contrary, assessors, in assessing National bank stock, will be presumed to have made the proper deduction for the real estate of the bank; and further, that if there be an omission to deduct the real estate, it is 'not "a manifest clerical or other error," to be corrected under chapter 695, Laws 1871.—REP.



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at \$56 each, and assessed the real estate at \$200,000, making the total value of the capital stock, including the real estate, \$1,400,000. They deducted from the value of each share \$8, being the one-seventh, or the proportion which the real estate bore to the whole amount of the capital stock, including the real estate, making the entire assessment upon the shares \$1,200,000. It is urged that this deduction was erroneous, and that instead thereof one-fifth of the value of each share, \$11.20, should have been deducted, thus reducing the value of each share to \$44.80 in the place of \$48, the amount of the actual assessment, and making a difference of \$80,000 in total amount of the taxable property assessed.

The statute under which the commissioners acted (chap. 761, Laws of 1866, § 1) declares, that the stockholders of any bank "shall be assessed and taxed on the value of their shares of the stock therein" \* \* \* \* "but not at a greater rate than is assessed on other moneyed capital in the hands of individuals in this State. And in making such *assessment* there shall also be deducted from the value of such shares such sum as is in the *same proportion to such value* as is the *assessed* value of the real estate of the bank \* \* to the whole amount of the capital stock of the said bank," etc.

The evident object and purpose of the act from which the foregoing provision is cited, was to provide a system of taxation of the stockholders of National banks by which they should be assessed for their shares in the same method and bear the same burthens as are assessed upon other property, and thus be compelled to pay their fair and just proportion of taxes to be levied. The clause in the section cited, to the effect that they were not to be assessed at a greater rate than other moneyed capital, clearly meant that they should be assessed as much and to the same extent and not a less rate than assessments are imposed upon individual owners of such capital according to law. They were to be assessed, as the act provides, on the value of their shares, meaning the market value or the price which such shares would bring without regard to the value of the real estate which was to be assessed separately. When the assessors had fixed upon the value of such shares then the deduction was to be made from the value of the shares of the real estate, and here the real point of the controversy is presented as to what that deduction shall be. It is to be proportionate and as the assessed value of the real estate is to the capital stock. The phraseology last employed must be considered in the connection

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with the "value of the shares" which have previously been inserted in the statute, and when the statute speaks of the "whole amount of the capital stock," it is reasonable to suppose that it had reference to its fair value and not to the nominal amount of the capital. It certainly includes the value as that constitutes the actual amount, and the important element which was to be taken into consideration in the assessment of the shares. The words last cited, as expressed in the section cited, include evidently every part of the assets of the bank from which an income is derived and from which the dividends earned are to be paid. This clearly comprehends the surplus on hand as well as any other investment which constitutes a portion of the capital. These sources of income represent the capital and form a material part of it, which is liable to be assessed as the act directs. The assessors are to consider every thing which gives value to the shares in fixing the basis of assessment. *The People ex rel. Gallatin Bank v. Commissioners, etc.*, 67 N. Y. 516. Such being the principle upon which the assessment is based it is not apparent in what manner a deduction can be made from the value of the shares in proportion to the nominal capital instead of the real capital according to its value. The word "*nominal*" is not used, and while the amount of the capital may be nominal it may also, when it has increased in value by profits earned, be far beyond that. And when it has thus become actually more valuable than the *nominal* amount there is no valid ground for holding that the latter sum should be the criterion. In fact the language cited would seem to indicate that it was intended by the Legislature to exclude any such construction.

In support of the construction placed upon the statute in question it may be observed that it tends to carry out the apparent intention of the law-makers to fix a fair and just valuation upon property of this description, while a contrary rule would operate unjustly and render a uniformity of assessment almost out of the question. No rule appears to be more equitable, rational and fair, than to assess the shares of bank stocks at their value, and then make the deduction in proportion to the real capital, as we think the statute authorizes. If it were otherwise, banking institutions which had been prosperous and successful and whose shares had been raised far above the par value might escape taxation upon a large portion of the amount of their capital, while those which had been unfortunate and reduced in value might be taxed upon a far

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greater amount than their entire capital, upon entirely a fictitious basis of value, and upon property which in fact had no existence. This clearly never was intended, and the rule applicable to the construction of statutes does not require such a strict interpretation of the law as will thus frustrate its design and completely pervert the object of the law-makers.

It may also be remarked that the basis of taxation adopted by the commissioners in this case appears to have been followed and approved in the case of *The People ex rel. Gallatin Bank v. The Commissioners, etc., supra*, recently decided by this court.

The General Term were in error in its decision and the judgment should be reversed and the writ of *certiorari* quashed.

*Judgment reversed.*

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TAYLOR v. HUTTON.

(43 Barbour, 185.)

*Right of directors of National bank to remove officers.*

Where the articles of association of a National bank, signed by all the original stockholders, and giving express authority to the directors to remove the president, have been transmitted to the Comptroller of the Currency, who has, on receiving the same, issued circulating notes to the bank, he will be deemed to have approved of the articles, and the directors will have the power to remove the president, even though the bank has never legally adopted any by-laws.

It is not necessary that any by-laws should be adopted before a president may be chosen or removed, and another appointed in his place.

Section 11 of the act of Congress, relative to National banks, authorizes the directors to remove the president of a banking association.

**A**PPPLICATION for the continuance of a preliminary injunction. The action was brought by two of the directors and two of the stockholders of the Fourth National Bank, in the city of New York, against the remaining directors, to restrain them from removing the president, Mr. George Opdyke, from his office.

*D. D. Field*, for plaintiffs.

*L. B. Woodruff* and *Jos. H. Choate*, for defendants.

PECKHAM, J. This is substantially an application for the continuance of an injunction to prevent the alleged illegal removal of the president of the Fourth National Bank, threatened by two-thirds of the directors, defendants herein. It is charged in the complaint that the defendants entered into a combination shortly after the election of the president to "drive him from his office with a view of putting a more pliable person in his place, and using the funds of the bank to aid in stock operations, instead of employing them in legitimate commercial and banking operations." The suit is commenced by two of the directors and two stockholders of the bank, the president not being a party. The purpose of the removal is very fully and specifically denied, though the intent to remove is admitted, and, as the defendants insist, for the true interests of the bank.

It appears from the papers in this motion that from soon after the election of the president on the 19th of January last, until the commencement of this suit, unpleasant difficulties and differences have existed between the president and a majority of the directors, as to the proper officers of the bank, and as to some other matters not material to specify. The directors finally determined to remove him, and it is now insisted that they have no such power. No allusion was made in the complaint, on which the temporary injunction was obtained, to the articles of association of this bank, signed by the stockholders.

The chief ground urged against the authority of the board to remove the president is, that the bank has never legally adopted any by-laws, and that there are none now existing; that they should be adopted by the stockholders and not by the directors, and that they should also be approved by the Comptroller of the Currency. They have been adopted by the directors only. It is conceded that they have never been adopted by the stockholders, nor in form by the Comptroller of the Currency. But suppose there are no by-laws yet adopted, I do not think it follows that the directors may not remove the president. The articles of association, signed by all the original stockholders (in some degree in the nature of a charter), give express authority to remove. Its sixth article provides that "the board of directors [a majority of whom shall be a quorum to do business] shall elect one of their number to be president, who shall hold his office [unless he should become disqualified or sooner removed by a two-third vote of all the members of

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the board] for the term for which he was elected a director." These articles of association, so adopted and signed, are to be, and in this case, from the facts presented, have been transmitted to the Comptroller of the Currency, who is by law required "to record and carefully preserve the same in his office." § 6 of the act. He must then, in substance, have approved of them, or he would not have issued the circulating notes to this bank, which he in fact issued under the 16th section of this act. The act of Congress also, in my judgment, authorizes this removal. In speaking of the powers of the directors, as I interpret the act, it says "they shall have power to carry on the business of banking by obtaining and issuing circulating notes in accordance with the provisions of this act, by discounting bills, notes and other evidences of debt, etc., etc., to choose one of their number as president of such association, and to appoint a cashier and such other officers and agents as their business may require, and to remove such president, cashier, officers and agents at pleasure, and appoint others in their places." § 11 of the act. I think this construction of the act, as having reference to the *directors* to do these things, and not to the *stockholders*, is quite plain.

It does not seem to be at all necessary that any by-laws should be adopted before a president may be chosen or removed, and another appointed in his place. This power is expressly given to the board, irrespective of any by-laws, both by the articles of association and by the act of Congress. Besides, it is a power that might be required to be exercised, or that it might be expedient to exercise, prior to the adoption of any by-laws.

It is also insisted that one of the defendants (Mr. Whitewright) is not legally a director, and has no right to unite in the removal. It appears that one of the original directors resigned, and that Mr. Whitewright was appointed to fill the vacancy, by the other members of the board, without any nomination at a prior meeting of the board as required by the by-laws, which, as the plaintiffs allege, were adopted by the board. Here the plaintiffs must invoke the aid of by-laws. The act of Congress prescribes that the vacancy in the board shall be filled by appointment by the remaining directors. § 43.

Assuming the plaintiffs to be correct in their position, that there are no by-laws, there is certainly no objection to the appointment under the statute. Besides, I may add, that the statute seems to

require the aid of no by-laws, and that none could be made to annul it.

If the by-laws exist and are valid, I do not think they apply to the appointment of a *director*, though it might have been a sound provision, had it been made. Irrespective of the by-laws and of the articles of association, the board have power, under the act, to remove the president by a mere majority vote; assuming that they modify and qualify the act, a two-thirds vote is required.

It is argued that the court should stay the action of the board until the 14th instant, when a meeting of the stockholders will be held and the whole difficulty settled. On mere questions of expediency of this character, courts have no power to interfere with the action of a bank or its officers.

The preliminary injunction is therefore dissolved, and the motion for its continuance is denied, with costs.

[At Chambers, New York, April 12, 1864, before PECKHAM, Justice.]

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PLATT, Receiver, v. BENTLEY.

(11 American Law Register, 171.)

*Offset by depositors.*

A depositor in a National bank which has failed and passed into the hands of a receiver, may set off the amount of his deposit against his debt to the bank on a note.\*

THE plaintiff, as receiver, took possession of the Farmers and Citizens' National Bank, September 5th, 1867. The defendant then had on deposit in the bank to his credit \$571.27. The

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\* See, however, *Venango National Bank v. Taylor*, post. In *Osborn v. Byrne*, 43 Conn. 155; S. C., 21 Am. Rep. 641, it was held that upon the insolvency of a savings bank a depositor cannot set off his deposit against a debt due from him to the bank, unless, perhaps, if the deposit was made for the purpose of applying on such indebtedness and the bank officer knew that fact.

On the other hand the Special Term of the Supreme Court of New York in *Matter of New Amsterdam Savings Bank v. Gartner*, 54 How. 385, it was held that a depositor in a savings bank was entitled to set off his deposit against his indebtedness to the bank.

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bank then held the defendant's note for \$800, to become due on the 5th day of November, 1867. The defendant paid the difference between the amount of the deposit and the note and interest, and for the rest claimed to offset the deposit in full, as against the equal balance of the note. The bank being insolvent, plaintiff, as receiver, brought suit on the note and claimed that the defendant should pay his note in full, and accept such dividends as the assets of the bank might *apportion* on the amount of the deposit.

*Theo. F. Jackson*, for plaintiff.

*J. M. Stearns* and *Homer A. Nelson*, for defendant.

J. F. BARNARD, J. It was the settled law in this State, even before our statute was passed, that a receiver of a bank takes the assets subject to subsisting rights between the bank and its customers, and that set-offs and counter-claims became operative to the same extent as if the bank was solvent and continuing business. Now, it is made statute law. If the plaintiff were the receiver of a State bank, there would be no question but that the defendant should be allowed his deposit upon his note. I see nothing in the Currency Acts which introduce any new principle. The receiver, it is true, is to collect all the debts and pay over proceeds to the United States Treasurer. But what is a debt? A customer of a bank, having a note about to mature, makes provision to meet and pay it by depositing in the bank having his note, the amount or part of the amount to be paid. It seems to me that the only debt the receiver takes is the balance between the note and deposit.

Judgment of the Special Term reversed and

*New trial granted.*

HARRINGTON V. FIRST NATIONAL BANK OF CHITTENANGO,  
appellant.

(1 Thompson &amp; Cook, 361.)

*Officers and servants of National banks—Term of engagement—Discharge of.*

Plaintiff, who had been hired by the president of a National bank as teller for a specified time, refused to obey certain orders of the cashier. Some time afterward the cashier informed the president of such disobedience, and he thereupon, before the expiration of the specified time, discharged plaintiff. *Held*, that plaintiff was not entitled to recover his salary for the unexpired portion of the term of service.

A servant may be discharged by the master for misconduct before the expiration of the time for which he was hired, although the discharge is not made at the precise time of the misconduct, nor the grounds stated.

A National bank cannot hire one of its officers for a specified time.

Knowledge, without objection, by the directors of a bank that one is acting in its employ does not ratify the details of a contract for his employment, by the president, unless they know of such details.

THIS was an action by the plaintiff to recover wages or salary, as the teller of a bank, from September, 1870, at which time he was discharged, until 1st April, 1871, which he claims was the end of the year for which he was employed, at the rate of \$70 per month.

The plaintiff recovered a verdict at the Circuit for the amount of his claim. Exceptions were taken by the defendant, an order made allowing a case to be made, and that the exceptions be heard in the first instance at the General Term of the Supreme Court. The exceptions, and the facts upon which they were founded, sufficiently appear in the opinion.

*Lansing & Kellogg*, for plaintiff.

*D. D. Walrath and Charles Mason*, for defendant.

P. POTTER, J. The plaintiff was dismissed by the president of the defendants. It was one of the defenses, set up in the answer, that during the plaintiff's employment he was insubordinate and



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disobedient to the directors of the defendant; that he disobeyed and disregarded their lawful instructions and commands, specifying the particulars, thereby forfeiting his position; and that for that reason he was dismissed, etc. There was evidence in the case that the plaintiff was left in charge of the bank after bank hours and at night. The bank is a place of deposit of bonds of the bank, of the stockholders, directors, and people of the vicinity, the outside windows slide up and down, but the building had inside iron shutters. These inside shutters the plaintiff left open at night. The evidence was, that he was remonstrated with by the cashier for this, and informed that it would not answer; that there was too much property there to be thus exposed; that the plaintiff replied that the windows would be left open if he desired it; that on that afternoon the cashier closed the iron shutters, and found out the next day they had been open again. The cashier testifies that he had another interview with the plaintiff next evening; that the plaintiff persisted in his conduct, and said he should open them just when he pleased.

There is some conflict of evidence as to those interviews, but none to the fact of leaving the windows open. There was also evidence of disobedience of the commands of the cashier about the entries in the books, not necessary to be stated. By the testimony of the cashier, the plaintiff was a relative of his, and he did not inform the president of his misconduct until about the time the plaintiff was dismissed. There is some conflict of evidence about the time of these occurrences, and the period between them and the discharge, and also as to the time when the president was informed of them. The president was seldom at the bank. This statement, however, is sufficient to present one of the points. The defendant's counsel asked the judge to charge, as a proposition, among other things, as follows: "*Twelfth.* Mr. Stewart (the president) was justified in dismissing the plaintiff for misconduct." This the court refused, and there was an exception; and also,

"*Thirteenth.* The president was not required to state any of his reasons for dismissing the plaintiff. If they existed, that was enough." The court refused to charge this, and there was an exception.

If these propositions were right, and the refusal so to charge was error, the learned judge did not cure the twelfth proposition by his subsequently charging it with a qualification as follows: "There

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were sufficient grounds for defendants' discharging the plaintiff from their employment, *if such grounds had been acted upon when they occurred, or had been stated to the plaintiff when he was discharged.*" The learned judge then adopts these qualifications as law, and adds: "As no reason or ground was stated to the plaintiff for his dismissal, when he was dismissed from the defendants' employment by the defendants' president, his discharge is not justified by the evidence if there was a valid contract then in force for plaintiff's employment for the term of one year from the 1st day of April, 1870, or by the month during the year." This portion of the charge was also duly excepted to.

I am inclined to think there was error both in the refusals to charge, and in this portion of the charge. It is assumed by the learned judge in these propositions, that the president of this bank had the power to dismiss the plaintiff from employment, upon sufficient grounds, if done at the proper time, if the grounds upon which he was dismissed had been stated when he was discharged. The jury were bound to regard this as the law, and to act upon it accordingly. The finding of the jury, then, being in favor of the plaintiffs, we must assume that the fact was established, in their minds, that though there was sufficient ground for dismissal, yet the discharge was illegal, because the discharge was not made when the act which was the cause of discharge was committed, or because the ground of discharge was not stated at the time of discharge. I think both these hypotheses are unsound. The first was dependent upon the existence of certain facts, which the judge assumed, but which were in conflict, and were therefore for the consideration of the jury. There is evidence that the discharge was made by the president about the time he was informed of the plaintiff's misconduct. If the fact of delay had been certain, as the judge assumed, it might perhaps have been proper to have submitted to the jury, whether the delay was not unreasonable, and whether the objection had not been waived or condoned. No such proposition was charged. From the charge, the jury were certainly instructed, in effect, that the discharge was illegal *because* the grounds were not stated to plaintiff at the time.

It is not necessary to discuss the proposition that for misconduct, or disobedience to lawful orders, the plaintiff could be dismissed—the judge correctly so charged. So, too, the judge charged that in this case, sufficient grounds existed for the plaintiff's discharge.

We have, therefore, upon this point only to examine the legal propositions: 1st. Whether the dismissal must of necessity be at the time of the occurrence of the misconduct; and, also, 2d. If it is required by law, that the grounds of the discharge be given at the time the discharge is made.

The case of *Cussons v. Skinner*, 11 Mees. & Wels. 161, was the case of the dismissal of the manager of a corporation for disobedience and misconduct. It was held that where there has been an act of disobedience or misconduct by a servant, known to the master at the time he discharges him, although the master does not mention *that* as the precise ground of discharge, he may afterward, by showing the fact existed, *and that he knew it*, justify such discharge. That case, it is true, turned upon a question of pleading, whether upon the defense of *willful disobedience and loss consequent*, the defense was not bound to prove these allegations, but as a general rule it was laid down as above cited. But that court cited as authority to sustain their holding, the case of *Ridgway v. Hungerford Market Co.*, reported in 3 Ad. & Ellis, 171; and 4 Nev. & Man. 797. That was the case of the dismissal of a clerk hired at a salary of £200 per annum, payable quarterly. Various questions arose in that case, the decision of which will apply to other points in the case at bar; but on the argument at bar in the Court of King's Bench, the counsel for the plaintiff put a supposed case to the court as follows: "Suppose a servant guilty of misconduct in June, and that the master, knowing it, retains him till November; or, suppose a master, in ignorance of misconduct, dismisses a servant, can the misconduct be set up as determining a contract which was deliberately determined on another ground?" Lord DENHAM, Ch. J., replied to these suppositions as follows: "In the present case the misconduct was known; and we cannot say the employers were bound to allege it *at the time* as the reason for dismissal; nor can we inquire as to their motives. If a sufficient cause of dismissal existed, they had a right to use it." (P. 174). Afterward, in bank, in consultation with the judges, Lord DENMAN said: "It is unnecessary to discuss how it would be, if the master, at the time of the dismissal, had no knowledge of the fact which was to justify it, yet I think the justification would be good, even if the fact, existing at the time, were not known to the master." LITLEDALE, J., said in the same case: "Neither the court nor the jury can discuss the ultimate motive. If a justifying cause exists, the master may assign it

whenever the action is brought; and whether any other cause exists is not material. It may be that the master dislikes the servant, and chooses to take advantage of some improper act." COLERIDGE and LITTLEDALE, JJ., expressed opinions to the same effect.

The same principle was held in *Baillie v. Kell*, 4 Bing. N. C. 651. It was like a case of suit for wages, after a dismissal of a clerk. Some grounds were assigned; other grounds were proved on the trial. In delivering the opinion of the court, PARKE, J., said: "But it is said the defendants did not, in fact, discharge the plaintiff for any one of the grounds alleged. That was entirely a question for the jury, who might well have thought that the defendants, without waiving the objection, *kindly abstained from sending the plaintiff forth from their service with a stigma on his character.*" These cases have not been questioned, to my knowledge, in our courts. If they correctly hold the law, there was no error in the case at bar on the trial. But it is argued that the propositions above discussed, charged and refused to be charged by the judge, must be viewed as connected with other parts, and with the whole charge, and was only a hypothetical view of the propositions, as connected with the president's power, and not that of the defendants, and that the jury must so have understood. This argument is not sustained by the facts. The last request made of the judge by defendants' counsel, and the reply made to it by the judge is an answer to this view. That request to charge was, "that the *defendant* was not bound to allege any special case of misconduct, because of his dismissal being for a special cause." To which the judge replied: "I should say that, if it was acted upon at that time." Certainly, either the president or the defendant did possess the power to discharge. The judge held the same rule as to each, viz.: "That the grounds must be stated at the time." The learned judge was fair and frank in expressing his legal view to the jury. He informed them that no grounds were stated for the discharge, and it was left to rest on the ground in regard to the shutters. (I think this was an error of fact. The cashier expressly testifies to disobedience in relation to entries in the books as to a check.) But, still referring to the plaintiff's conduct in regard to the shutters, the judge expresses his legal opinion, "that these grounds cannot now be considered as a justification for his discharge." This would seem to be in direct conflict with what he had previously charged, but for the reason given in the argument, he addressed to the jury

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by way of illustration; which was, in effect, that the discharge was too long after the offense, and that he could not *then* be discharged unless he had repeated the offense, "*without giving him the reason.*" The question of lapse of time after the offense was not a question of law for the judge; besides the fact as to time was greatly in conflict. It was a question of fact for the jury. It was error for the judge to assume that knowledge of the offense had been for a long time; that it was in the month of May, as testified by plaintiff, and ignore the testimony of the cashier; that it was in August or September of the same year when the president was first informed of it.

I have thus far discussed this question upon the doctrine of the common law. I think the power as well as the right of the defendants to dismiss the plaintiff exists by the act of Congress, under which all National banking institutions are organized, of which law the plaintiff is presumed to have notice. That act, among other things, authorizes such associations "to appoint a cashier and such other officers and agents as their business may require, and to remove them at pleasure and appoint others in their place." \* The plaintiff's appointment could legally be made in no other way, and could only be held by the tenure specified, to wit: the pleasure of the appointing power, and the place must be regarded as having been taken and accepted under the provisions of this act.

If I am right in this view, then the learned judge erred in refusing to charge the sixth proposition of the defendants' counsel, that "the by-laws of the bank and the charter of the defendant will not permit any officer or officers of the bank to make a contract which will deprive the directors of the free right to remove their teller at any time they please, and if such a contract was made by Mr. Stewart (president), as the plaintiff claims, for a year, it is illegal and void, being in contravention of the charter, and is also void upon principles of public policy." Though the learned judge refused to charge this in the form requested, and an exception was taken, he did afterward charge it, with a qualification, "that the contract was invalid unless ratified by the directors; and that if such a contract was made as plaintiff claimed, and it was ratified

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\* Section 5136, Rev. Stats., provides that National banks should have power, among other things: *Fifth.* To elect or appoint directors, and by its board of directors to appoint a president, vice-president, cashier and other officers, define their duties, require bonds of them and fix the penalty thereof, dismiss such officers, or any of them, at pleasure, and appoint others to fill their places.

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by the directors of the defendant, by acquiescence, with knowledge that the plaintiff was in service of the defendant as their teller or clerk, the contract became valid by such ratification, and the plaintiff is entitled to recover damages for being so discharged. And he afterward charged them, "that if the contract was made by the president and was ratified," as above stated, the plaintiff was entitled to recover for seven months' wages, as damages, at the rate of \$840 per year," all of which was excepted to. It will be remembered he had before also charged them, "that sufficient grounds existed for plaintiff's discharge, if the grounds had been acted upon when they occurred, or the grounds had been stated when he was discharged." I think this whole charge, though by no means intended, was calculated to mislead the jury, and that it is not sound.

The plaintiff's discharge was ratified precisely in the same manner that his employment was. If the employment was ratified, the discharge was also. The judge concedes there was sufficient grounds for the discharge; he concedes the discharge to have been made by the defendants; yet holds the law to be, upon this hypothesis, that if the employment was in form for a year, the plaintiff can recover his salary, even after his discharge, for the remainder of the year. I do not concur in these views. I think there was another condition in the contract, a condition that is always implied in every contract of the kind. Whether it was for a month, a year, a definite or indefinite time, it was subject to the right of the employer to dismiss the employee for sufficient cause; and if sufficient cause for dismissal exists against the employee, it is a forfeiture of future salary. One of the considerations, which enter into the contract between the employer and employee, is good conduct by the employee, at least so good as not to furnish sufficient cause for dismissal; and a failure so to perform amounts to a forfeiture of the contract, and justifies a discharge. The case of *Ridgway v. Hungerford Market Co.*, *supra*, was an employment by express contract, at a salary of £200 per annum, payable quarterly. His employment commenced on the 10th June, 1830; he was continued to the 17th April, 1833, when he was dismissed; he offered and was willing to remain in service. He brought this action in December, 1853, for three-quarters salary. It was contended by the defendants, that being dismissed for sufficient cause, he was not entitled to any portion of his current salary. Lord Ch.

J. DENMAN tried the cause, and submitted it as a fact to the jury whether the cause for discharge was sufficient. The jury found the cause sufficient. The issue, then, as a question of law, was precisely the same as the question in the case at bar; and thus it came before the Court of King's Bench. The Lord Chief Justice said: "The jury having found the cause of discharge sufficient, the court must so hold," and he added, "*Turner v. Robinson*, 5 Barn. & Adol. 789, and many other cases, have shown that if a party hired for a certain time so conduct himself that he cannot give the consideration for his salary, he shall forfeit the current salary even for the time for which he has served." PARTISON, J., in the same case concurring, says: "By his own act he gives the defendants the power of displacing him." And COLERIDGE, J., said: "Although a party be hired for a given time, the master is justified in dismissing him for misconduct; and, in that case, he cannot recover *pro rata*." The case of *Turner v. Robinson*, 25 Eng. Com. L. 257, was a like case of a servant employed at a salary of £80 per annum, dismissed for misconduct before the year expired, and who sued for his wages for the year, and was nonsuited on the trial; and, upon a rule to show cause, the case was brought before the full bench. PARKE, J., who gave the opinion, said (assuming the employment to be for a year): "Having violated his duty before the year expired, so as to prevent the defendants from having his services for the whole year, he cannot recover wages *pro rata*." So, too, in the case of *Spain v. Arnott*, 2 Stark. N. P. 227, it was held by Lord ELLENBOROUGH, "that if a servant, hired for a year, refuse to obey his masters's orders, the master is justified in dismissing him before the end of the year, and the servant cannot recover any wages." See, also, *Baillie v. Kell*, 4 Bing. N. C. 638. This same rule is laid down by Chitty on Cont. (10th Am. Ed., by Perkins) 628, 629. See, also, *Amor v. Fearon*, 9 Ad. & Ell. 551. I find nothing to shake the authority of these, and a great number of other cases to the same effect. I think, therefore, the refusal to charge as requested was error. Where the servant is hired for a time certain, and dismissed without sufficient cause, then the rule, it is conceded, is as charged by the learned judge. Parsons, in his treatise on Contracts, adopts the same rule, as the established law, vol. 1, pp. 520, 521, and notes and cases cited.

I think there was another error in the charge of the learned judge, in his fourth proposition, as explained by the seventh. In

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the fourth proposition he charged the jury that if the president had made such a contract with the plaintiff as plaintiff claims, and that contract was subsequently ratified by the directors of the defendant *by the acquiescence with knowledge that the plaintiff was in the service of the defendant as its teller or clerk*, the contract became valid by such ratification, and the plaintiff "is entitled to recover damages for being so discharged." If this charge carried to the mind of the jury that what was specified in it constituted a legal ratification (as to my mind clearly it did), it was erroneous. The jury could well so understand. The language of the charge had a clear tendency to make them understand that a ratification by the defendant, by *acquiescence*, not with knowledge that the president had employed him, but with knowledge that he was in their service as their teller or clerk, and that an acquiescence in that knowledge was a ratification of the president's contract, of which employment by the president there is no evidence of the knowledge. The evidence that he was in their service adds nothing to the evidence of ratification, but the contrary. He had been for years in their employment, performing the same duties, under an express contract made by themselves, made by resolution, made at a specified consideration. The legal presumption, then, is, that he was continuing on under that contract until the defendants were informed to the contrary. But by the explanation made by the judge of his meaning, in his seventh proposition, it is clear that his definition of what constitutes a legal ratification, especially as applied to this case, was erroneous. He says: "The defendant acquiesced in the employment of the plaintiff by their president, if they knew he was acting in their bank as teller or clerk, and made no objection to his serving there at or after the defendant's directors had a meeting at their bank." To make a ratification by the principal of the unauthorized act of an agent good, it must be made with a full knowledge of the facts which affect the rights of the principal. This main feature of ratification is omitted. This knowledge was a question for the jury, not for the judge. The facts, if they were as assumed by the judge (as I think they were not), were greatly in conflict, and were insufficient to constitute a valid ratification. *Nixon v. Palmer*, 8 N. Y. 398; *Brass v. Worth*, 40 Barb. 648. There was not only no direct evidence of knowledge by the defendants of the president's hiring the plaintiff, but the president's testimony,



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to the contrary, is as follows: "I don't think I communicated to any of the directors about the hiring of him." "No action of the board of directors, in regard to the increase of wages to him." "There was no meeting of the finance committee after January and prior to July of that year." The vice-president swears he knew nothing of the hiring by the president until the plaintiff was discharged. Daniel Gates, a director, swears to the same, and the only knowledge the cashier had was the fact that he found, on the 29th of June, 1870, that the plaintiff had credited himself on the books of the bank for April and May, \$70 each.

Without noticing other objections, I think those that have been discussed are sufficient to justify the ordering a new trial, costs to abide the event.

MILLER, P. J., and PARKER, J., concurred in the result.

*New trial ordered.*

CHATHAM NATIONAL BANK OF NEW YORK v. MERCHANTS'  
NATIONAL BANK OF WEST VIRGINIA, appellant.

(4 Thompson & Cook, 196.)

*National bank—"Citizen" of State where located—Entry of appearance—Removal of cause from State to Federal court.*

In an action by a National bank of New York against a National bank of West Virginia, *held*, that the defendant was not deprived of the right to demand a removal of the cause from the State court to a Federal court. National banks are "citizens" of the State in which they are organized and located.\* Defendant served a notice of appearance on December 15th, but did not file a petition for the removal of the cause from the State to the Federal court until January 7th, the petition stating that defendant then entered its appearance and had not done so before. *Held*, a valid compliance with the Federal statute requiring the defendant, "at the time of entering his appearance in the State court," to file his petition.

\* As to removal of actions against National banks, see *Cooke v. State National Bank*, ante, 698; *Bird's Executors v. Cockrem*, ante, p. 284. By the Rev. Stats., § 640, (which is the act of July 27, 1868), National banks are expressly excluded from its provisions.

For judicial purposes National banks are regarded as citizens of the States where they are located. *Davis v. Cook*, ante, p. 656; *Cooke v. State National Bank*. But in *National Park Bank v. Gunst*, post, and note, it was decided that a National bank was a foreign corporation within the act requiring security for costs.

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**A**PPEAL by defendant from an order denying a motion on the part of defendant for the removal of the cause to the United States Circuit Court for the Southern District of New York. The action was brought by the Chatham National Bank of the city of New York against the Merchants' National Bank of West Virginia to recover the proceeds, amounting to \$2,242.83, of various checks alleged to have been received by defendant for collection for plaintiff. The plaintiff is a corporation created and existing by the laws of the State of New York and of the United States, and is located and doing business in New York city. The defendant is a corporation created and existing under the laws of West Virginia and of the United States, and is located and doing business at Wheeling, in that State. Defendant filed a petition stating the above facts and demanding a removal of the cause to the Federal court. The petition was denied and defendant appealed. The remaining facts appear in the opinion.

*Chapman, Scott & Crowell*, for appellant.

*J. H. & B. F. Watson*, for respondent.

DANIELS, J. The sworn petition of the defendant stated that the plaintiff was a corporation or banking association, created and existing under and by the laws of the State of New York and of the United States, located and doing business at the city of New York, in the State of New York, and at the time of bringing the suit was, and still is, a citizen of the State of New York. This was not denied on the part of the plaintiff, and should for that reason be accepted as the truth; and, as such, it was sufficient to present a case within the act of Congress providing for the removal of causes into the Circuit Court of the United States, so far as the right depended upon that circumstance.

It is claimed, however, that the name by which the plaintiff has been incorporated indicates it to be an association formed for banking purposes under the laws of the United States providing for the creation and circulation of a National currency; and that circumstance, added to the fact stated in the petition, that it is a corporation or banking association created and existing under the laws of the United States as well as of this State, sufficiently warrants that conclusion.

But that does not divest the defendant of the right to insist upon

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the removal of the cause into the Circuit Court of the United States, even though it may have been withheld where each of the parties to the action is shown to be a foreign corporation. *Ayres v. Western Railroad Co.*, 48 Barb. 132. These associations have been held liable to the attachment laws of this State, although existing and transacting their business within its boundaries, because the remedy they provide for includes such associations, on account of the circumstances of their creation under the laws of another government than that of the State. *Bowen v. First National Bank of Medina*, 34 Howard, 408. But that does not justify the conclusion that they are foreign corporations within the ordinary signification of those terms. That, certainly, cannot properly be said to be their character; for, when they are organized and located within this State, they are as completely citizens of the State, within the signification of the act of Congress providing for the removal of causes into the Circuit Court, as though they were incorporated exclusively under its laws. The act of Congress upon this subject constitutes, under the Constitution of the United States, a portion of the laws of the State, paramount even to those enacted by its own Legislature. It exists through and extends over the State as completely and entirely as any legislation can by possibility do; and it is a portion of the positive law required to be observed and maintained by all its citizens and inhabitants. When an association for banking purposes is formed within the boundaries of the State for the purpose of being located and transacting business within its limits, it necessarily becomes an inhabitant of the State. This is clearly implied by the provision of the act requiring the certificate under which the association may be formed to state the place where its operations of discount and deposit are to be carried on, designating not only the State, territory or district, but the particular county and city, town, or village. 13 U. S. Statutes at Large, 101, § 6, subd. 2. Besides that, the names and residences of the shareholders are also required to be stated; and the general power is to be conferred upon it of suing and of being sued in any court of law and equity, as fully as natural persons; and its usual business is required to be transacted at an office or banking-house located in the place stated in its organization certificate. *Id.*, § 3, subd. 3, also § 8. The association, when formed, has no other residence or domicile than that designated under the provisions of the act in the certificate, and that substantially and effectually renders

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it a corporation of the State within which it may be located, formed under that portion of its laws which, under the Constitution, have been enacted for its inhabitants by the general government. As such, it is to be presumed, under the construction given to the act of Congress providing for the removal of causes, to be created and formed by citizens of the State in which it may exist, and for that reason to be a citizen of the State within the meaning of that act. *Louisville, etc., R. R. Co. v. Letson*, 2 How. (U. S.) 497; *Stevens v. Phoenix Ins. Co.*, 41 N. Y. 149, and cases referred to in the opinion.

The act of Congress of July 27, 1868, does not deprive the defendant, although itself a banking association organized under the United States Banking Laws, of its right to insist upon the removal of the cause. That act provides for the removal of actions brought against corporations organized under a law of the United States, or any of their members in a new class of cases not within the other provisions of congressional legislation on this subject. And it permits that to be done when the defendant states in the petition that a defense exists, arising under or by virtue of the Constitution or any treaty or law of the United States. From this privilege banking associations organized under the laws of the United States are excluded by an exception contained in the act. 15 U. S. Statutes at Large, 256, 257. But the exception by its terms extends no farther than the subject-matter of the act in which it is contained, and consequently can have no effect upon the provision made for the removal of causes in other cases by the preceding law. It simply left these associations unaffected by its provisions, and entitled to the privileges provided in this respect for suitors by other acts of Congress. And among them the right of removing the action into the Circuit Court of the United States, when the circumstances of the case appear to be such as are required to justify that proceeding.

By the act under which the application was made in this case, the petition was required to be filed at the time of entering the defendant's appearance in the action (1 U. S. Statutes at Large, 79, § 12), and that, it is claimed, was not done in this case. Other objections of a mere formal nature were relied upon by way of answer to the application. They were predicated upon defects in the copies of the papers served upon the plaintiff's attorneys; but as they did not exist in the papers themselves, on which the application was made, they were very properly disregarded upon the

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hearing. The more substantial objection was placed upon the circumstance that a notice of the defendant's appearance was served in the action on the 15th day of December, 1873, while the petition itself was not presented until the 7th of the following January; and upon that reason the court denied the application for the removal of the cause, holding that the appearance was entered within the meaning of the terms used in the law at the time when the notice itself was served.

But this was a mistaken view of the provision requiring the petition for the removal of the cause to be filed at the time of entering the defendant's appearance; for the mere notice of appearance was not the entering of an appearance required by the act of Congress. That by Rule 7 of this court is something more than the mere service of a notice. It contemplates an act to be performed on the filing of the notice with proof of its service. Upon that being done, the rule authorizes the defendant's appearance to be entered as of the time when the notice itself was served. The notice was simply a notice of the defendant's appearance, without an entry of it; and was no more than the notice of retainer, which, under the preceding practice, the defendant was authorized to serve in the action, which was held insufficient to constitute the entry of appearance required by the act of Congress providing for the removal of causes into the United States Circuit Court, on the ground on which the right is claimed in this action. *Norton v. Hayes*, 4 Denio, 245.

No other act appeared to have been performed on the part of the defendant, before the filing of the petition, from which it could be claimed that an appearance of the defendant had been entered, while the petition contained the statement that it then entered its appearance, and had not done so before; and the order requiring the plaintiff to show cause why the application should not be granted recited the fact that the defendant, on the day of its date, had entered its appearance, and at the same time filed its petition for the removal of the cause, and offered the security required by the act, by a bond then filed; and as there was no contradiction of this statement, it should be accepted as true, as long as the mere service of the notice was not the entry of an appearance. *Porter v. Bronson*, 20 How. 292; *Rugg v. Spencer*, 59 Barb. 388.

No appearance appeared by the papers to have been previously entered, and this statement, as well as the other to the same effect

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contained in the petition, sufficiently showed its entry at the time when the order was made, to constitute a performance of what the act of Congress required to be done in that respect.

But if it did not, procuring the order and making the motion were equivalent to the entry of an appearance, within the technical meaning of those terms, for by such acts the defendant of necessity appears in court. They could not be performed without an appearance in court, as well as an appearance in the action. This was substantially held in the case of *Ayres v. Western R. R. Co.*, 48 Barb. 132, where obtaining an order extending the time to answer was considered to be the entry of an appearance, and for that reason sufficient to justify the denial of a motion afterward made for the removal of the cause. See, also, *Cooley v. Lawrence*, 12 How. 176.

The provisions of the act of Congress were complied with in all other particulars, and an order should, therefore, have been directed for the removal of the cause. The order appealed from should be reversed, with costs, and an order entered directing the removal of the cause into the Circuit Court of the United States.

DAVIS, P. J., concurred.

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SECURITY BANK OF NEW YORK V. NATIONAL BANK OF THE COMMONWEALTH.

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(4 Thompson & Cook, 518.)

*National bank — Action against, after appointment of receiver*

An action may be brought against a National bank notwithstanding a receiver of it has been appointed.\*

**A**PPEAL from an order at Special Term denying a motion to open a judgment against defendant entered by default. The action was brought by the Security Bank of the city of New York against The National Bank of the Commonwealth, to recover for a loan. A judgment was entered by default, and this motion was made upon the application of the receiver of the defendant, appointed under the National Currency Act to open the same.

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\* See *Green v. Walkill National Bank*, post, p. 786.

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*H. Edwin Tremain*, for appellant.

*Arnoux, Ritch & Woodford*, for respondent.

DANIELS, J. A receiver was appointed, under the National Currency Act (13 U. S. Stat. at Large, 115), of the books, assets and records of the defendant, as an insolvent National banking association, in September, 1873, and he entered upon the discharge of his duties in that capacity. After that, and on the 4th of March, 1874, the summons in this action was served upon George Ellis, the defendant's president. And he, to use his own language concerning his singular and extraordinary conduct following the service, supposing that his connection with the bank ceased by the appointment of the receiver, "took no notice of any papers that were served upon him, as an officer thereof, and did not do so in regard to the summons herein, nor did he inform said receiver of said service." This is the sworn statement of the defendant's president. And it so completely describes his utter want of moral, as well as official sense of accountability, as to dispense with all further attempts at characterizing his conduct. The consequence of this inexcusable neglect to inform the receiver of the service of the summons was, that on the 17th of April, 1874, a judgment was entered in favor of the plaintiff, and against the defendant, for nearly \$57,000, and the receiver swears that his first knowledge of its recovery, or of the commencement of the suit, was on or about the 21st day of April, 1874, when a transcript of the judgment was presented to him by the plaintiff's attorney.

On the 11th day of May, 1874, an order was procured at the instance of the receiver, and some of the defendant's directors, who were actuated by a different sense of duty from that which impressed its delinquent president, for the plaintiff to show cause why "the judgment should not be set aside and the defendant have leave to answer the complaint," and on the 26th of that month the motion was heard and denied, with liberty to renew it, on further affidavits. It was renewed again, on additional affidavits, on the 16th of June, 1874, and then finally denied.

The present appeal is from the order then made, and it is resisted strenuously, on the ground, among other reasons, that the order is not appealable.

[The court decided that the order was appealable and other questions of practice, and continued.]

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The bank continued to exist notwithstanding the appointment of the receiver. The suit was therefore properly instituted against it, and the defense should accordingly be made by it. *Bank of Bethel v. Pahquioque Bank*, 14 Wall. 383 (*ante*, p. 77). The order appealed from should be reversed with \$10 costs, and disbursements on the appeal to the defendant and appellant, and an order should be entered setting aside\* the judgment and allowing the defendant, within ten days after notice of the order, to serve an answer to the complaint, on payment within that time of \$10 costs of opposing the motion, and the disbursements made on the entry of the judgment.

*Ordered accordingly.*

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PEOPLE *ex rel.* WILLIAMS V. ASSESSORS OF ALBANY.

(5 Thompson & Cook, 155.)

*Assessment of National bank stock — Value of stock, how determined — Correction of erroneous assessment.*

Bank stock should be assessed at its full and true value, and, therefore, where assessors assessed stock at its par value, when its actual or market value was in excess of the par value, *held*, error.

The relators were owners of stock in the N. bank, which was assessed at par, but which was worth more than par in the market. The shares of the M. bank, located in the same city, were also assessed at par, although they were worth more than the shares in the N. bank. The relators demanded a reduction of the assessment on their stock, either by a direct order of the court or by reassessment, on the ground that their stock, being less valuable than that of the M. bank, was erroneously taxed at the same rate. *Held*, (1) that the assessment was erroneous; (2) that although the assessment on the shares of the relators would be increased on a reassessment of their property pursuant to the statute, yet, as their shares were worth less than those of the M. bank, the failure to tax the latter at their full value increased the ratio of taxation upon the shares of the relators, and thereby injured them; (3) that as the return to the *certiorari* did not set forth the value of all the bank stock worth more than par in the city or ward, the court had not the facts from which to determine the real extent of the injury, and could not, therefore, direct a reduction of the assessment; and (4) that the court could not, under the circumstances, direct a reassessment.



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**C**ERTIORARI to the board of assessors of the city of Albany upon the relation of Chauncey P. Williams and others, to correct an assessment made by the board of assessors of the city of Albany.

The case came before the court upon the return of the defendants to such writ of *certiorari*, and upon a motion of the defendants to quash or supersede the writ. The relators were owners of stock of the National Exchange Bank of Albany, the actual or market value of which was fifty-two per cent more than par. The Mechanics and Farmers' Bank of Albany was located in the same ward, and the actual value of its shares was largely in excess of that of the shares of the National Exchange Bank. The defendants adopted the par value as the standard of valuation in the assessment of bank stock whenever it was worth par or any greater sum, and accordingly assessed the shares of both of said banks at their par value after deducting the assessed value of their real estate. The relator Williams appeared before the board and demanded that the shares of the National Exchange Bank be reduced in forty-one per cent of the shares of the Mechanics and Farmers' Bank, that being the difference in their real value. The board refused to make the reduction.

*Matthew Hale*, for relators.

*R. W. Peckham*, for defendants.

BOCKES, J. This case is before the court, on the return to a writ of *certiorari*, having for its object the correction of assessments, made by the board of assessors of the city of Albany against the shareholders of the National Exchange Bank of that city. The relators demand by way of relief a reduction of the assessments against them on their shares of stock, either by the direct order of the court, or by a reversal of the proceedings of the board as to them, with directions which would secure the result. There is also a motion on the part of the defendants to quash the writ.

The case has given us great anxiety in its consideration, surrounded as it is with perplexing questions, affecting both public and private interests. It is, as we think, entirely plain that the basis of assessment against the owner of shares of stock of the banks, as certified to us by the board of assessors in answer to the

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writ in this case, is erroneous. The assessments have not been made against the shareholders "on the *value* of their shares of stock," as the law requires (Laws of 1866, ch. 761), but were made, as the fact is certified in the return, at par value, without regard to the true value, in excess of par. Such basis of assessment was in manifest disregard of the plain directions of the statute. This seemed so utterly indefensible, that on our first consideration of the case, we concluded to reverse the proceedings of the board of assessors, and to direct a reassessment. But on further examination and reflection, we find that this disposition of the case would be attended with serious difficulties. Such revisions of the roll, if ordered in this proceeding, could be but partial; nor would it at all correct the error we deem so palpable.

The only alteration which could be made on this proceeding would be by way of reduction of the assessment of the shares held by the relators, the shareholders in the National Exchange Bank. This only they demand. They ask for a reduction of the assessed value of their shares of stock which are already assessed too low; and, as has been already suggested, a reassessment of all the property on the roll, with a view to secure entire fairness and equality of taxation as regards all the tax payers, is at this late day impracticable. The complaint here is not that the relators are assessed too high, but that some other parties on the roll (the shareholders in the Mechanics and Farmers' Bank) are assessed too low. Yet it is not claimed that the assessment against the latter can now be raised. To reduce the assessment against the relators might produce equality as between them and the shareholders in the Mechanics and Farmers' Bank; but it would also produce inequality, as between them and all others on the roll, who must be presumed to be represented fairly thereon. The rights of all the tax payers on the roll should be considered, and no order or direction should be here given which would work general inequality and injustice.

We are unwilling to give even apparent sanction to the action of the board of assessors, as certified to us in the return. The statute under which such action was taken was not duly observed. But to grant the relators the relief demanded by them, either by here reducing the assessments against them, or by directing a reduction by the board of assessors, would but give sanction to the error already perpetrated, and enhance its enormity. We are therefore led to the conclusion, contrary to our first impressions, that the true course to be adopted by us is to quash the writ.

COUNTRYMAN, J. It is an undisputed fact appearing in the return that the board of assessors, in the assessment of all bank stock in the city of Albany, adopted as their standard of valuation the par value of the shares whenever the actual or market value was equal to or exceeded the par value, and regardless of the actual value whenever it exceeded par. This was a palpable violation of the laws of this State, requiring and regulating the assessment of property for the purpose of taxation. The Revised Statutes require that "all real and personal estate liable to taxation shall be estimated and assessed by the assessors at its *full and true value*, as they would appraise the same in payment of a just debt due from a solvent debtor." 1 R. S. 393, § 17. And to secure a strict performance of this duty, the assessors are also required by a subsequent enactment, for a willful violation of which they incur the penalties of perjury, to make oath that the "assessment roll contains a true statement of \* \* \* the taxable personal estate of each and every person \* \* \* at the *full and true value* thereof, according to their best judgment and belief." Laws of 1851, ch. 176, § 8 (3 Edm. Stat. at Large, 350, § 8). The rule had been uniform for many years prior to the organization of National banking associations; under the acts of Congress (12 U. S. Stat. at Large, 665; 13 id. 99), to assess the capital stock of all the banks against the corporation themselves, in the same manner and at the same valuation as other personal property against private individuals. Laws of 1853, ch. 654, § 10; Laws of 1857, ch. 456, § 3.

But after the enactment of the Federal law, and the organization of National banks, it became necessary, to obviate the difficulties caused by the subsequent decisions of the Supreme Court of the United States (*Bank Tax Case*, 2 Wall. 200; *Van Allen v. Assessors*, 3 id. 573 [*ante*, p. 1]), to make the assessment upon the stock of these associations against the individual shareholders, and to adopt a rule for the assessment of this species of property, which should be applicable alike to all the banks, whether organized under the laws of the State or of the United States. The act of 1866 (Laws of 1866, ch. 761) was passed for this purpose, and rendered the shares of stock in the National banks equally liable to taxation with the shares in the State banks. The act provides that the shareholders in all of these corporations, State and National, shall be based and taxed on the *value* of their shares of stock, which "shall be included in the valuation of the personal

property of such stockholder in the assessment of taxes, but not at a greater rate than is assessed upon other moneyed capital in the hands of individuals in this State. The mode of ascertaining the value of the stock is not prescribed in the act, as this had been previously done in the Revised Statutes, accompanied with an express declaration that the same method "shall be followed in all assessments, except where the assessors shall be specially required by law to observe a different rule." 1 R. S. 393, § 18. The purpose of the act was three-fold: 1. To make the stock in the National banks liable to taxation under the laws of the State. 2. To provide "that the tax so imposed \* \* \* shall not exceed the rate" imposed upon the shares of the State banks, as required by the act of Congress. 3. To prevent an assessment "at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens," in compliance also with the Federal law. The adoption by the Legislature of these additional limitations in the act of 1866 is, therefore, no indication of an intention to change the rule enjoined in the Revised Statutes for ascertaining the value of this kind of property or of prescribing a different value for any of the purposes of assessment and taxation. These provisions were necessary in compliance with the conditions imposed in the act of Congress, which only permitted the State authorities upon these terms to levy a tax on the shares of stock in the National banks. 13 U. S. Stat. at Large, 105, § 16; 104, § 21; 112, § 41; *Van Allen v. Assessors*, 3 Wall. 357 (*ante*, p. 1). The conclusion is inevitable that it was the duty of the defendants to have assessed the shares of stock in all of the banks at their true value instead of their par value, and that all of the assessments are unauthorized and erroneous where the actual value of the stock is above par.

It is urged, however, that the relators cannot complain, because upon their own statements they have not been injured, as the shares of the National Albany Exchange Bank, in which they are stockholders, have only been assessed at their par value, whereas their real value, as claimed by the relators themselves, is fifty-two per cent more than par; so that their assessments would be increased on a reassessment of their property pursuant to the statute. But this objection ignores another very important fact, to wit: that the shares of the relators are nevertheless worth only about forty-one per cent of the actual value of the shares of the Mechanics and Farmers' Bank, which are also assessed only at their par

value. It thus appears that as between the two banks, the shares of the former are assessed at the same valuation as those of the latter, whereas if the correct standard had been followed, the assessment of the shares of the former would have been fifty-nine per cent lower than that of those of the latter bank.

It also appears from the reports of the officers of The Mechanics and Farmers' Bank, annexed to the return, that the amount of surplus and undivided profits in the bank, which escapes taxation under the method of valuation adopted by the board of assessors, is over \$750,000. The result is apparent that the amount of tax assessed against all the other taxable property included in the assessment roll must necessarily be increased. All of the tax payers, including the relators, may therefore be injured by the erroneous assessment made against the shareholders in the Mechanics and Farmers' Bank. In the language of GROVER, J., in the case of *People ex rel. Marsh v. Delaney*, 49 N. Y. 655 (opinion not reported), "the grievance does not consist in a violation of law, in consequence of which the assessment of the relators' property is larger than it should have been, but in a violation whereby the capital stock of the defendant's corporation has been assessed at a sum less than it should have been, thereby increasing the ratio of taxation upon the property of the relators to some extent, and also upon the property of every tax payer in the city."

We have endeavored to find some practical legal remedy to correct these serious irregularities. The relators ask to have their assessment reduced to forty-one per cent of the assessment upon a corresponding number of shares of the Mechanics and Farmers' Bank, or if that be held inadmissible, a reassessment on the shares of both banks, based upon their actual value. Both of the remedies proposed are as bad as the disease, and the adoption of either would necessarily result in a violation of the statute. We cannot redress one wrong by the perpetration of another, under the forms of law, equally flagrant and indefensible. It does not follow because the shares of a particular bank, severally representing a par value of \$100, were actually worth in the market over \$350, that all other bank stock in the ward except the relators' was also of the same value; and that the relators are therefore entitled to have their assessments reduced to the same proportionate valuation. In all the cases cited on the argument, where the court, on a *certiorari*, made an order reducing the assessment of the relator

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to a definite amount, the facts fully appeared in the return, so that upon a comparison of his assessment with all the others on the roll, according to the true standard of valuation, the precise extent of the injury could be ascertained. But in this case the return does not contain these essential facts, and we have no means of determining, even from annexed exhibits, the real value of the stock of any of the banks except the relators' and the one selected as the subject for their complaint. It is quite possible that the shares of stock thus selected and presented to the court are of much higher value than those of any other bank in the city, and indeed that the shares of all the other banks are of far less value than those of the relator's. However this may be, the relators should have procured a return, setting forth the real value of all the bank stock worth more than par in the city, or at least in the sixth ward, if they desired an order requiring the assessors to make a specific reduction of their assessment. The other alternative suggested by the relators, of directing a reassessment of the assessors upon the shares of both banks, on the basis of their actual value, is equally untenable. If any reassessment were ordered, it should include all the bank stock, worth more than par, in the ward if not in the city, and this relief we would readily grant if it could be made effectual. But an insuperable difficulty is presented, from the fact that none of the assessments against shareholders in the banks can now be increased, and a reassessment, therefore, upon the only feasible basis, according to the rate of valuation of the shares of the highest value appearing on the assessment roll, would require a readjustment of all the property on the roll, which, at this late day, is quite impracticable. Besides, it would involve the same violation of the statute under the sanction of the court, of which complaint is now made, as it would require a reassessment of all the taxable property at less than one-third of its real value. The writ of *certiorari*, in cases of this character, does not issue *ex debito justitiæ*, but, in the sound discretion of the court upon special cause shown, and when issued, will be superseded, if the remedy sought be inconsistent with the interests of public justice and convenience. *People v. Supervisors of Allegany*, 15 Wend. 198; *People ex rel. Marsh v. Delaney*, 49 N. Y. 655. We are constrained, in view of all the difficulties suggested, and the public embarrassments which would ensue from an interference at this time with the assessments, to supersede the writ, and the motion to quash must, therefore, be granted, without costs.

*Writ quashed.*

## HAVENS v. NATIONAL CITY BANK OF BROOKLYN. \*

(6 Thompson &amp; Cook, 346.)

*National bank cannot be garnisheed.*

A National bank holding funds belonging to a bankrupt estate as depositary of a bankrupt court cannot be garnisheed in proceeding supplementary to execution.

PROCEEDINGS supplementary to execution on a judgment recovered in an action by Haven against Dutcher, assignee in bankruptcy of the Central Bank of Brooklyn, upon an indebtedness of said bank. The defendant had money deposited with it, belonging to said Central Bank, but deposited to the credit of said Dutcher as assignee in bankruptcy.

The Special Term made an order requiring said National City Bank to pay over to the judgment-creditor the amount of his judgment out of the moneys deposited.

The bank appealed.

*W. H. Hollis*, for appellant.

*E. L. Sanderson* and *John H. Bergen*, for respondents.

BARNARD, P. J. The defendant, the National City Bank of Brooklyn, is not a corporation having property of the judgment-debtor under section 294 of the Code.

It is a depositary of the Bankrupt Court of the United States for the Eastern District of New York. It has no power to pay out any of the funds so deposited except upon a warrant of the assignee in bankruptcy countersigned by the District Judge or by a Register in Bankruptcy of the district.

The fund is in the Bankrupt Court and is to be disposed of by order of that court. Bankrupt Law of 1867, § 27.

The Bankrupt Court has the sole jurisdiction over the bankrupt estate.

*Order reversed, with \$10 costs.*

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National Bank of Fairhaven v. The Phoenix Warehousing Company.

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NATIONAL BANK OF FAIRHAVEN V. THE PHOENIX WAREHOUSING  
COMPANY.

(8 Hun, 71.)

*National banks cannot maintain branch offices in New York.*

A National bank located in another State cannot keep an office for discount and deposit in New York, and cannot maintain an action upon a note discounted at such office.

One accustomed to deal with a National bank as such, and who so deals with it in respect to a promissory note, is estopped from denying the incorporation of the bank in an action on the note.\*

ACTION upon promissory notes made by the defendant and indorsed to the plaintiff, a National bank. The referee to whom the case was referred found that the bank was organized under the National Banking Act, and was located in Massachusetts, and that the notes were due and unpaid.

*F. E. Dana*, for appellant.

*John Winslow*, for respondent.

DAVIS, P. J. The plaintiff sufficiently proved its incorporation under the general banking laws of the United States by the production of the certificate of the Comptroller of the Currency. The point that a copy, and not the original certificate, was produced, was distinctly waived, and cannot now be urged. Besides, it appeared by the evidence in the case that the defendant was accustomed to deal with the plaintiff as a corporation, and did so deal in respect of the notes in suit. The defendant was thereby estopped from denying the incorporation of the plaintiff. *Palmer v. Lawrence*, 3 Sandf. 161; *Steam Nav. Co. v. Weed*, 17 Barb. 378; *White v. Coventry*, 29 id. 305; *Sands v. Hill*, 42 id. 651; *White v. Ross*, 15 Abb. Pr. 66. There was sufficient evidence to show the making of the notes by the defendant. Its incorporation was admitted by the answer. The signatures of the president and secre-

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\* See *Huffaker v. National Bank*, ante, p. 504.



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tary to the notes in suit were proven. That was enough to show, *prima facie*, at least, that the notes were properly made on behalf of the corporation, and to devolve the burthen on the defendant to show that they were made without authority and outside of the business of the corporation. No attempt was made to do this:

The offer of the defendant to show failure of consideration of the notes, in whole or in part, was properly rejected. It was not accompanied with any offer to show that plaintiff was not a holder of the paper in good faith and for value in due course of business; and it already appeared that its notes had been discounted or taken in renewal of discounted paper, in due course of business. It was of no importance that, after the non-payment of the notes at maturity, the plaintiff had received collateral security from the indorser of the notes. That fact could not affect the plaintiff's right to enforce the notes still held by it as the principal indebtedness. There is nothing in the point that the referee allowed interest in the notes. The law awards interest, and the court or a referee may compute it without any other proof than what appears on the face of the notes.

This disposes of all the points of the appellant but one, and that seems to us altogether more serious.

The plaintiff was a banking corporation, organized under the laws of the United States, doing business in the State of Massachusetts. It was, therefore, a foreign corporation, and as such was subject to the restraining laws of this State whenever it attempted to do banking business within this State.

The defendant offered to show, that at the time of the discount of the original notes and of the discount of the notes in suit, plaintiff had an office in the city of New York for banking purposes, and that these notes were discounted at that office. "The proof of the offered fact would *prima facie* show an illegal discounting of the paper in this State, in direct violation of the statute, which prohibits all corporations, not authorized by the laws of this State, from keeping an office in this State for the purpose of discount or deposit (1 R. S. [2d ed.] 706, §§ 6, 7), and would have devolved upon the plaintiff the necessity of showing that it was authorized by law to keep such office and discount the notes in this State.

The authorities settle that there can be no recovery in the courts of this State upon paper thus discounted by a corporation acting

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in violation of our statutes. *De Groot v. Van Duzer*, 20 Wend. 390; *New Hope Delaware Bridge Co. v. The Poughkeepsie Silk Co.*, 25 id. 648; 1 R. S. (2d ed.) 708, §§ 6, 7. Section 2 of article 1, title 4, chapter 8, part 3 of the Revised Statutes (2 R. S. 458), provides that where by the laws of this State any act is forbidden to be done by any corporation of this State, without express authority of law, and such act is done by a foreign corporation, it shall not be authorized to maintain any action founded upon such act, or upon any liability or obligation, express or implied, arising out of, or entered into in consideration of such act. The provisions of these statutes are still in force, and we see no reason why they are not as applicable to the National banks located and doing business in other States, as to any other class of foreign corporations. It is no answer to say that the evidence already given by the plaintiff showed that such offer was not founded in fact. The defendant was not estopped by that evidence from showing the fact to be otherwise, and in accordance with the assertion of its offer. It seems highly probable that it would have failed in the attempt; but that is no legal reason for denying the right to give evidence, tending to prove the offered facts, for the consideration of the referee.

The exceptions to the refusal to permit proof under the offer was well taken, and for this error the judgment must be reversed and a new trial granted, costs to abide the event.

DANIELS and BRADY, JJ., concurred.

*Judgment reversed and new trial granted, costs to abide event.*

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(7 Hun, 63.)

*Action against National banks after dissolution.*

An action may be maintained against a National bank after a receiver of it has been appointed by the Comptroller of the Currency.\*

**A**CTION against a National bank and its receiver. The opinion states the case.

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\*See *Ordway v. Central National Bank*, ante, p. 559; *Security Bank v. National Bank*, ante, p. 774.

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*D. D. McKoon*, for appellant.

*Dill & Royce*, for respondent.

TAPPEN, J. This is an appeal from a judgment dismissing the plaintiff's complaint at the Orange Circuit. The action is brought to recover the value of a bond for \$1,000, which plaintiff alleges the bank converted to its own use, etc. The bank failed in December, 1872, and the Comptroller of the Currency appointed Burroughs receiver, who is joined as defendant, it being alleged that he refuses to allow or to hear the plaintiff's claim; no personal judgment is sought against him. The court dismissed the complaint at the Circuit before any proofs were offered. The defendant moved for the dismissal upon the ground that no cause of action was stated against either defendant. The exceptions were ordered to be heard at the General Term in the first instance. The defendants argue, at General Term, in support of the dismissal, that no action will lie against the bank because of its dissolution, and that it is no longer a body corporate.

A similar question was presented in *Pahquioque Bank v. First National Bank of Bethel*, 36 Conn. 325, and the appellate court then held that the appointment of a receiver under the National Bank Act does not work an absolute dissolution of the corporation. The law under which the bank was organized is known as "An act to provide a National currency," etc., approved February 25th, 1863, and June 3d, 1864. It provides in the 50th section that in the case of banks which have suspended and are being wound up by the Comptroller by means of a receivership, the Comptroller shall make a ratable dividend on all claims that may have been proved to his satisfaction or *adjudicated in a court of competent jurisdiction*.

Jurisdiction is given by the act to State courts in a county where the institution is located. The Connecticut case, which will also be found in 4 Wallace, 283, also holds further, that when the creditor has established his claim he does not acquire a lien on the property nor secure any preference; that he must take his position with other creditors whose claims are allowed or proven, and await the action of the Comptroller in the distribution of the assets realized by the receiver.

That the action is maintainable in this form is also held in *Ken-*

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*nedy v. Gibson*, 8 Wall. 506. The receiver is a proper party in proceedings for the adjudication of claims against the bank. *Turner v. Bank of Keokuk*, 26 Iowa, 262. The act of Congress has not made either the Comptroller or the receiver the final tribunal for the decision of the rights of parties making claims against a National bank which is being closed out, and such legislation, if attempted, would be of doubtful validity. In *Bank v. Kennedy*, 7 Wall. 19, the court held that the receiver might sue in his own name or in the name of the bank. The two positions taken by the defendant are not consistent with each other; they firstly claim that the Comptroller is the only party to whom the claim can be presented, or "who can be sued;" and, on the other hand, they quote the case of *The Bank of Selma v. Colby*, U. S. S. C., Oct., 1874, to the effect that the Comptroller is to discharge his duties in disposing of and distributing the assets "*without interference by courts.*"

We think the rule laid down in the Connecticut case is the law, and hold that the corporation is not absolutely dissolved; that both it and the receiver may be made parties to an action to establish the claim of a creditor which has been rejected either by the Comptroller or receiver, and that the plaintiff's action was well brought for that purpose; and further, that the recovery of a judgment does not either give lien or priority to the creditor. It seems that the peculiar or indefinite language of section 50 of the act, leaves it in doubt whether the receiver or the Comptroller is the proper party for the adjudication of claims; but the receiver being the active agent for the protection of the bank and its creditors, and being within the same jurisdiction as the bank, he is a proper party in such proceedings.

The judgment should be reversed, and new trial ordered at Circuit, costs to abide the event.

Present—TAPPEN and TALCOTT, JJ. BARNARD, P. J., not sitting.

*New trial ordered; costs to abide event.*

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Southwick v. The First National Bank of Memphis.

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## SOUTHWICK V. THE FIRST NATIONAL BANK OF MEMPHIS.

.. (7 Hun, 96.)

*Attachment against non-resident National banks.*

The provision of the National Banking Act that attachments, injunctions, etc., shall not be issued by State courts against National banks before final judgment relates only to actions against banks where the action is brought, and not to cases where the action is against a non-resident corporation.

**A** PPEAL from an order of the Special Term of the Supreme Court denying motion to vacate an attachment.

*Francis C. Barlow*, for appellant.

*John E. Burrill*, for respondent.

DAVIS, P. J. The defendant is a National bank located at Memphis, Tenn. At the beginning of this action the plaintiff obtained an attachment against the defendant and levied the same upon moneys in the Park Bank, in the city of New York, belonging to the defendant.

The defendant having appeared generally in the action, now moves to vacate the attachment, on the ground that it was obtained and issued in violation of section 57 of the National Banking Act of 1864, as amended by section 2, chapter 269 of the Laws of Congress of 1873 (3d session.) As so amended, that section reads as follows:

"SEC. 57. And be it further enacted, that suits, actions and proceedings against any association under this act may be had in any circuit, district or territorial court of the United States, held within the district in which such association may be established, or in any State, county or municipal court in the county or city in which said association is located, having jurisdiction in similar cases. *Provided, however*, that all proceedings to enjoin the Comptroller under this act shall be had in a circuit, district or territorial court of the United States, and held in the district in which the association is located. *And provided, further*, that no attachment, injunction or execution shall be issued against such association or its property, before final judgment in any such suit, action or proceedings in any State, county or municipal court.

The court below held that the case of *Cook v. The State National*

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*Bank of Boston* necessarily involves the question presented in this motion, and accordingly refused to vacate the attachment. That case holds, in substance, that section 57 of the act of 1864 did not intend to take away the general jurisdiction of State courts over corporations created under the National Banking Act, wherever the same may be located, and that it is not competent for Congress to deprive the State courts of jurisdiction in all actions against banking associations organized under the act, or to restrict the jurisdiction to particular courts. It accordingly upheld the jurisdiction of the State courts of this State, in an action against a National banking association located and doing business in the State of Massachusetts.

We are not asked by the learned counsel for the appellant to disregard the rulings of the Court of Appeals in *Cook v. The State National Bank of Boston*, but to hold that Congress has power, notwithstanding the general jurisdiction of the State courts, in suits against such National banks, to enact that no attachment, injunction or execution against such association or its property, shall be issued before final judgment; and he insists that by the amendment of section 57, passed in 1873, Congress has imposed such restriction on the State courts, as well in actions against associations located in other States, as in actions against associations established in the State where suit is brought. The amendment of 1857 was probably made because of the decisions of the courts of this State holding that National banking associations, located and doing business in this State, were subject to the process of attachment as *foreign corporations*, under the peculiar definition of such corporation given by our Code of Procedure, to wit: "*A corporation created by or under the laws of any other State, government or country.*" Code, §§ 227, 427. The amendment should be construed with an eye to the mischief sought to be prevented, and it should not be held that Congress intended to take away the ordinary, and, in many cases, the only process by which suits in State courts can be commenced against banking associations located in other States. It is not necessary to consider the question whether Congress has power to inhibit the commencement of suits against National banks in the State courts by attachment, where property of such banks is within the jurisdiction of the court, although the bank itself is established in another State, unless we are satisfied that the true construction of the amendment of 1873 raises that question.

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The amendment referred to constitutes the second proviso of 57, above quoted, as is in these words: "And provided, further, that no attachment, injunction or execution shall be issued against such association, or its property, before final judgment in any such suit, action or proceeding in any State, county or municipal court." The prohibition, it will be observed, is not extended to any suit, action or proceeding, but to "any *such* suit, action or proceeding," and the use of the word "*such*," in connection with suit, action or proceeding, requires us to ascertain to what it relates in the section of the act in which it is used. In doing this, we find that the preceding language of the section speaks, so far as it relates to State, county and municipal courts, only of suits, actions and proceedings against associations located where the suit is brought, or, in the words of the act, of suits "*in the county or city in which such association is located*;" and it is only "*in any such* suit, action or proceeding, in any State, county or municipal court," that the proviso forbids the issuing of an attachment, injunction or execution before final judgment. This seems to be the plain, common sense construction of the language used; and if we accept the decision of the Court of Appeals, above referred to, as a correct exposition of the law, as this court is bound to do, then we are not at liberty, by any liberal or implied construction, to extend the prohibition to such suits as that now before us. If suits may be brought in this court against National banking associations located in other States, notwithstanding the restrictions expressed or implied in the 57th section of the National Banking Act, then there seems to be no difficulty in holding that such suits may be commenced by the ordinary and only process known to our laws, which, in this case, is the process of attachment against property situated within this State.

There seems to us no reason to question the power of Congress to prohibit "attachment, injunction and execution before judgment" in actions brought in our courts against associations located in our State. Such prohibition may be wise and salutary, inasmuch as those banks may be proceeded against by the ordinary process of the courts without resort to provisional remedies. The prohibition does not disarm the State courts of jurisdiction, and Congress alone is to determine whether the several remedies named will tend to destroy or impair the usefulness of the National banks in their localities, and should, therefore, be prohibited. See opinion of SWAYNE, J., in *The National Bank of Buffalo v. Dearing*, ante, p. 117.

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The right of the corporations or associations "to sue and be sued, complain and defend in any court of law and equity as fully as natural persons," is given in the most general terms by subdivision 4 of section 8 of the act under which they are created. See U. S. Rev. Stats., p. 999. And Congress has gone no further in the provisions of the 57th section, than to protect them from the summary processes specially named in suits brought in the State, county or city of their location. As to suits against such corporations as cannot be reached by personal process, Congress has left intact the remedies provided by State laws. It follows from these views, and from the law as laid down in *Cook v. The State National Bank of Boston, ubi supra*, that the attachment in this case was properly issued.

The order should, therefore, be affirmed, with \$10 costs, besides disbursements.

BRADY and DANIELS, JJ., concurred.

*Order affirmed, with \$10 costs and disbursements.*

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## OCEAN NATIONAL BANK V. CARLL.

(7 Hun, 237.\*)

*Receiver — Control of State court over.*

A State court cannot order a receiver for a National bank, appointed by the Comptroller of the Currency, to pay a judgment recovered against the bank before the appointment of the receiver.

**A**PPEAL from an order of the Special Term denying defendants' motion that the receiver of the Ocean National Bank (the plaintiff) pay out of the moneys in his hands the judgment in favor of the defendants for costs in this action.

*Nelson Smith*, for appellant.

*Dunning, Edsell & Hart*, for respondent.

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\*This report contains only an abstract of the opinion which is there given in full.



DAVIS, P. J. The action was commenced in this court by the Ocean National Bank in December, 1870, and has been continued in the name of such bank. On the second trial thereof which took place December 24, 1874, the plaintiff's complaint was dismissed with costs and judgment was entered against the Ocean National Bank for such costs.

On the 15th of December, 1871, Theodore M. Davis was appointed by the Comptroller of the Currency, under section 50 of the National Banking Act, receiver of said bank, and under that appointment took possession of the assets of said bank and had in his hands money sufficient to satisfy the judgment. The bank is insolvent. Prior to making the motion the defendant's attorney requested the receiver to pay the judgment, which he refused to do. The motion was denied.

The receiver was not an officer of this or of any other court. He was appointed by the Comptroller of the Currency under section 50 of the National Currency Act, and as such was the agent or officer of the Comptroller, clothed with the powers and duties specially conferred by the act of Congress.

By section 50 under which his appointment was made he is required, under the direction of the Comptroller, to "take possession of the books, records and assets of every description of such association, collect all debts, dues and claims belonging to it" \* \* \* to "pay over all money so made to the Treasurer of the United States subject to the order of the Comptroller, and also make report to the Comptroller of all his acts and proceedings."

The disposition of all moneys so collected and paid over is given to the Comptroller of the Currency, and the receiver does not pay out the moneys of the bank, or have any authority to make other disposition of them than to pay them into the treasury of the United States, subject to the order of the Comptroller. §§ 5234, 5236, R. S. of the U. S.

It seems to us very clear, under the provisions of the act referred to, that no order can be made by this court directing the receiver to pay the costs of the judgment against the Bank: First, because the court has not jurisdiction of the receiver in a case in which he has not been made a party to the record, to make such an order; secondly, because the receiver has no power to pay out the moneys collected by him for the purpose of extinguishing the judgment, inasmuch as his duty is to pay the same into the treasury of the

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United States, subject to the order of the Comptroller. The demand upon him is therefore nugatory.

The defendant should have presented his claim to the Comptroller of the Currency for payment out of the proceeds of the assets received by him.

We do not intend, in deciding this motion, to determine what power the courts may possess if the receiver had brought the action, or had been made a party to the record and prosecuted the same, after his appointment, in his own name as such receiver.

The only question now determined is, that upon the state of facts presented upon the motion the defendant was not entitled to the order sought for.

The order must be affirmed with \$10 costs besides disbursements.

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BUSHNELL V. THE CHAUTAUQUA COUNTY NATIONAL BANK.

(10 Hun, 378.)

*National bank—Deposits in, as collateral security for the performance of agreements between third parties—Ultra vires—When no defense.*

A National bank indorsed upon a contract of sale and delivery between A and B, that B had deposited \$2,500 in the bank, "to be held by us as collateral security for the faithful fulfillment of the within contract." *Held*, (1) that the bank had the power to receive the deposit and enter into the said contract; (2) but that, even if the contract was *ultra vires*, the bank would be estopped from setting up that defense in an action by A, as he had performed his part of the agreement, relying on the undertaking of the bank.

**A**CTION to recover the sum of \$2,500 deposited with the defendant bank by one Shaw. In September, 1874, the plaintiff Bushnell and said Shaw entered into an agreement in writing, whereby the former sold and agreed to deliver to the latter ten thousand barrels of crude petroleum, for which Shaw agreed to pay one dollar and twenty cents per barrel on delivery. Thereupon, and as part of the agreement, Shaw deposited with defendant \$2,500, and the bank indorsed on the said agreement the following: "Jamestown, September 26, 1874. T. A. Shaw has this day

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deposited in the Chautauqua County National Bank of Jamestown, N. Y., twenty-five hundred dollars (\$2,500), which is to be held by us as security on the faithful fulfillment of the within contract." This was signed by the cashier. Plaintiff claimed to have performed his part of the agreement, but that Shaw had not performed his.

The defendant demurred to the complaint, and the demurrer was sustained and the complaint dismissed by the Special Term of the Supreme Court.

*E. C. Sprague*, for appellant.

*R. P. Marvin*, for respondent.

SMITH, J. [After construing the contract.] Another point taken by the respondent's counsel is, that the contract of the bank was *ultra vires*. By undertaking to hold the money as security for the fulfillment of Shaw's contract, the bank, in our opinion, impliedly promised the plaintiff that, in case Shaw failed to perform, the bank would pay to the plaintiff his damages thereby incurred, not exceeding \$2,500. The promise is implied from the terms of the undertaking, and from the fact that the bank caused Shaw's acceptance, with the indorsement of the bank upon it, to be delivered to the plaintiff before he signed the contract with Shaw. The bank had power to receive the deposit. As an incident to that power, it had authority to assent to any terms or conditions respecting the use or disposal of the money deposited which the depositor saw fit to impose, provided they were not illegal or prohibited by the defendant's charter. If Shaw had chosen to deposit the money payable absolutely to the plaintiff or his order, the receipt of it by the bank, and the issuing of a certificate in accordance with those terms, would have been strictly within its legitimate and ordinary business. What difference does it make as to the power of the bank to receive and hold the money, that the deposit was payable to the plaintiff upon the happening of a future contingent event, and that the amount to be paid to him was also contingent and uncertain, but was capable of being definitely ascertained, and was in no event to exceed the amount of the deposit. It is said that a trust was created. In the same sense there is a trust in the case of every bank deposit by one per-

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son to the use or credit of another. It is argued by the respondent's counsel that the bank became a surety for Shaw. Not at all. Its obligation was that of a principal debtor. It was indebted to Shaw for the money deposited, and it agreed to discharge its indebtedness by paying to the plaintiff. We are not aware of any provision of law which incapacitates a National bank from receiving a deposit of money on the terms above stated.

But assuming that the undertaking of the bank was *ultra vires*, yet, as it was not illegal, we think the defendant is estopped from setting up that defense. As has been said, the legal effect of the transaction between the bank and the plaintiff was that the bank agreed, if he would enter into the contract with Shaw, that he should be compensated out of the money deposited from any damage he might sustain from Shaw's failure to perform. The condition on which Shaw made the deposit was that the bank should undertake to that effect. The agreement of the bank was an appropriation by it of the deposit to the plaintiff's use, by the direction of the depositor. The agreement has been fully executed on the part of the plaintiff by his entering into the proposed obligation to Shaw. It would be a fraud upon him to release the defendant from its part of the agreement, and the bank is therefore estopped from setting up a mere want of power. *Whitney Arms Co. v. Barlow*, 63 N. Y. 62.

It was not necessary or proper for the plaintiff to set out the implied promise of the defendant in the complaint. It was enough to allege the facts out of which the implication arises. *Eno v. Woodworth*, 4 Comst. 249; *Glenny v. Hitchins*, 4 How. Pr. 98; *Crapsey v. Sweeny*, 27 Barb. 310; *Moak's Van Santvoord's Pl.* (3d ed.) 186, and cases there cited.

These views, if correct, dispose of the several positions taken by the learned counsel for the respondent.

The judgment appealed from should be reversed, and judgment ordered for the plaintiff on the demurrer, with leave to the defendant to answer in twenty days, on payment of the costs of the demurrer and of this appeal.

MULLIN, P. J., and TALCOTT, J., concurred.

*Ordered accordingly.*

## NATIONAL PARK BANK V. GUNST.

(1 Abbott's New Cases, 292.)

*National bank — Citizenship of*

A National bank is a foreign corporation under a statute requiring corporations created by "the laws of any other State or country," to give security for costs.

**M**OTION to compel the plaintiff, a National bank, to give security for costs on the ground that it was a corporation organized under the laws of another State or country within the statute which provides that "a foreign corporation created by the laws of any other State or country may, upon giving security for the payment of the costs of suit, prosecute, in the courts of this State, in the same manner as corporations created under the laws of this State." 2 Rev. Stat. 457.

*C. E. Souther*, for the motion.

*Peter B. Olney*, *contra*.

MONELL, Ch. J., decided in favor of the defendant, and an order was entered requiring the bank to file the requisite bond as security.

NOTE.—No opinion is reported in the foregoing case. The counsel cited the case of *Merchants' National Bank v. MacNaughton* (not reported), decided at Chambers Supreme Court by LEONARD, J., who held, on a question regarding pleadings and proof of incorporation, that "the plaintiff must be held to be a foreign corporation," citing *Bowen v. First National Bank of Medina*, 34 How. 409. No opinion was reported.

In *Bowen v. First Nat. Bank*, *supra*, the General Term of the Supreme Court, First District, held, that National banks were foreign corporations under a statute authorizing attachments against "corporations created by or under the laws of any other State, government or country." The Bank-

ing Act was afterward amended so as to prohibit attachments of National banks before judgment and the case is therefore no longer authority and is not included in this volume. That case is not only not an authority for the above case of *National Park Bank v. Gunst*, but the reasoning of the court is against it. In Gunst's case the statute related to corporations created by the laws of "any other State or country" while in Bowen's case the statute related to corporations created by or under the laws of "any other State, government, or country," and it was on the word "government" that the court based its opinion that National banks were within the act.—REP.

## NATIONAL STATE BANK OF NEWARK V. BOYLAN.

(2 Abbott's New Cases, 216.)

*Usury — Counter-claim for interest in action by National bank — Limitation of.*

In an action by a National bank the defendant cannot be allowed a counter-claim for unlawful interest paid by him more than two years prior thereto.\* One of two or more defendants cannot set up an individual counter-claim unless, under the pleadings, there can be a several judgment against him.

ACTION by the National State Bank of Newark against James B. Boylan and John Boylan on judgments against them obtained in the Supreme Court of New Jersey.

The defendant, John Boylan, answering separately, alleged, among other things, that he was liable, if at all, only as surety and conditionally, and that between February, 1871, and June, 1875, the plaintiff had exacted from him usurious and unlawful interest for loans and discounts made to and for him, and that the plaintiffs had so received from him \$7,000 in excess of the lawful interest allowed by the laws of the State and the act of Congress under which plaintiff was incorporated. For which sum defendant asked a judgment in his favor. The plaintiff demurred.

*Martin & Smith*, for plaintiff.

*Oliver J. Wells*, for defendant.

SEDGWICK, J. The decision of this demurrer involves a construction of section 30 of 13 U. S. Statutes at Large, June 3, 1864, as to the time within which an action for an excess of interest received by the plaintiff on a usurious loan by it to the defendant may be brought.

The act declares that every association may receive on a loan or discount "interest at the rate allowed by the laws of the State or territory where the bank is located, and no more." \* \* \* "And the knowingly taking," etc., "a rate of interest greater than

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\* See *Shingle v. First National Bank*, post.

## National State Bank of Newark v. Boylan

the aforesaid shall be held and adjudged a forfeiture of the entire interest, which the \* \* \* evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or persons paying the same \* \* \* may recover back, in an action of debt, twice the amount of interest thus paid, from the association taking \* \* \* the same; provided that such action is commenced within two years from the time the usurious transaction occurred."

Whether or not the statute gives a general cause of action, based upon the illegality of a National bank taking more interest than is allowed by the law of the State where the bank is situated, as declared by the first part of the section, in addition to the particular causes of the action given thereafter, such general cause of action to be governed by the statute of limitations of the State or of the United States, in case there should be one, is to be determined solely by the intent of the section. It was competent, of course, for Congress to declare that a borrower should have no such general cause of action.

I am of opinion that the section provides in its special clauses, for all the causes of action that result from an infraction of the section. The special clauses are so framed and attached to the rest of the section, that thereby is implied the negative of there being a general cause of action so to call it.

The statute did not take away the right to recover the principal of a loan on which usurious interest has been taken or agreed for. It proceeds to say, that the taking or charging a usurious rate is to be held a forfeiture of the entire interest, and if a usurious rate has been paid, twice its amount may be recovered back, provided the action has been begun within two years. An entire scheme of protection, involving a policy peculiar to it, is thus given to a borrower. In case the interest has been paid, twice the amount of the usurious rate may be recovered, and in all other cases, the bank forfeits all right to the interest

At common law, if the borrower were oppressed, as he was supposed to be, by the usurer, and paid the usurious rate, he could recover it, because, although, *in pari delicto*, he was a victim. The United States statute gives an action in such a case of a peculiar kind, which makes the borrower whole and enforces the policy of the statute.

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At common law, if he had not paid the usurious interest, and then, on demand, voluntarily paid it with the principal due, in the absence of some statutory action he could not recover the excess of interest back. Under the United States statute the interest being forfeited, if the borrower voluntarily pays it, without something more, but for the action to be brought within *two* years, the borrower cannot recover it back. \*

So that we see the statute by a way of its own provides for all the cases in which a borrower may be protected, just as did the common law, and in such a form, that to me it seems clear that the particular provisions are meant to include all the consequences to be attached to a violation of the provision that says a bank shall take the interest of the particular State and no more. *Farmers', etc., Nat. Bank v. Dearing*, 1 Otto, 29; *Palen v. Johnson*, 50 N. Y. 49; *Smith v. Marvin*, 27 id. 137; *Wheaton v. Hibbard*, 20 Johns. 290. The reasoning of *Palen v. Johnson* is to be applied in this case, and the United States statute takes hold of the right of action, under the general prohibition, and regulates its exercise, just as in that case the statute took hold of the right under the section declaratory of the common law and regulated its exercise.

*Palen v. Johnson* is a precedent to allow advantage being taken by demurrer of a limitation of this kind, instead of by pleading the statute of limitation.

On general principles it seems to me clear, that, if, especially when all circumstances of oppression are wanting, the borrower chooses to pay voluntarily, his action is confined to the statute.

There are some parts of the counter-claim which refer to interest received within two years. There is a doubt raised, whether part of the counter-claim, being on this point good, a demurrer will lie to the whole counter-claim. It is unnecessary to decide this at this time, because I find a fatal objection to the whole counter-claim.

It is based upon an objection peculiar to the defendant John Boylan, individually. This is not proper matter for a counter-claim, unless there could be, under the pleadings, a several judgment against him. There could not be, because the complaint is upon a judgment against him and another jointly.

Without at all deciding that if this judgment were against an indorser and a maker of a note, it is joint, there is no allegation of the answer that such is the character of the judgment, or that the defend-



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ant is liable thereon as a surety. The answer says that if the plaintiff have any claim against him it is only on his liability as surety, but this supposition or possibility does not refer to the judgment pleaded, for the defendant denies that there was such a judgment, by denying any knowledge of its execution or any information sufficient to form a belief as to its existence. *Perry v. Chester*, 12 Abb. Pr. (N. S.) 131; *Bathgate v. Haskin*, 59 N. Y. 533.

The demurrer should be sustained with costs, with leave to amend within twenty days upon payment of costs. No amendment should be permitted, however, which includes in a counter-claim sums paid for alleged usurious interest, both before and after the commencement of the two years specified by the statute, but they may be separately stated, so that the question of law may be clearly settled.

There was no appeal, and the defendant amended his answer.

## CENTRAL NATIONAL BANK V. RICHLAND NATIONAL BANK.

(52 Howard, 136.)

*Attachments against National banks.*

An attachment cannot be issued from a State court against a National bank before final judgment, whether such bank be located in this State or not.

**M**OTION to vacate an attachment granted in an action in the Supreme Court of New York by the Central National Bank against the Richland National Bank, of Mansfield, Ohio, and under which, the property of the latter in New York was attached.

*C. A. Davison*, for plaintiff.

*B. F. Lee*, for defendant.

BARRETT, J. An attachment is not always essential to the acquisition of jurisdiction in a suit against a foreign corporation. Such jurisdiction is acquired in several ways. 1st. In all cases by the personal service of the summons, within this State, upon its president, secretary or treasurer. 2d. If the cause of action arose in this State, by such service upon (in addition to the three officers

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named) any other of the corporation, its cashier, or a director, or managing agent thereof. 3d. By such service upon any one of such persons when the corporation has property within this State. 4th. By the publication of the summons in either one of two cases — (a) when the cause of action has arisen in this State ; (b) when the corporation has property within this State. Code, §§ 134, 135.

These provisions are apparently decisive of this motion, because it is only where jurisdiction cannot be acquired without resort to an attachment that the power of Congress to inhibit, or rather to postpone, the use until final judgment of such a provisional remedy seems to be at all questionable

The Court of Appeals did not deny this power in *Cooke v. The State National Bank of Boston*, 52 N. Y. 96 (*ante*, p. 698). It merely decided that it is not competent for Congress to deprive the State courts of jurisdiction in all actions against National banks, nor to restrict such jurisdiction to the Federal courts. The Supreme Court of the United States, however, in *The Farmers and Mechanics' Bank of Buffalo v. Dearing*, *ante*, p. 117, asserted a power in Congress wide enough to deprive us of all jurisdiction over such corporations. "The State can exercise no control over them," says Mr. Justice SWAYNE, "nor in anywise affect their operation, except in so far as Congress may see proper to permit." Be that as it may, the decisions are unanimous as to the power to relieve National banks from the garnishee process. *Crocker v. Marine National Bank*, 101 Mass. 240 (*ante*, p. 575); *Chesapeake Bank v. First National Bank*, 40 Md. 269 (*ante*, p. 531); *Cadle v. Tracey*, 11 Blatchf. 102 (*ante*, p. 230). The power to create, as was said in the *Farmers and Mechanics' Bank of Buffalo v. Dearing*, *ubi supra*, carries with it the power to preserve ; and if Congress is of the opinion that the usefulness of these institutions is likely to be impaired by the tying up of their funds in distant States, pending a litigation, protection therefrom is a reasonable exercise of such power to preserve.

This was conceded in *Southwick v. The National Bank of Memphis*, 7 Hun, 96 (*ante*, p. 789). The question in that case was whether the power had been exercised by section 57 of the act of 1864, as amended by section 2 of chap. 269 of the laws of Congress of 1873 ; and it was held, owing to the peculiar and somewhat obscure phraseology of the act, that the intention was merely to inhibit attachments against such corporations when located within

our own jurisdiction. All question as to the intention of Congress, however, was set at rest by the Revised Statutes of 1874, sections 5242, 5198, as corrected in the appendix. As if to meet the construction thus placed upon the words "such action or proceedings" in the connection in which they are found in the amendment of 1873, the prohibitory clause is removed from its old connection and transferred to section 5242, in which no particular class of suits is previously designated. Then the word "such" is omitted, and now the provision reads as follows: "No attachment, injunction or execution shall be issued against any such association or its property before final judgment in any suit, action or proceeding in any State, county or municipal court."

This clearly meets the suggestion of the presiding justice in the *Southwick Case*, that the prohibition "is not extended to any suit, action or proceeding, but to any such suit, action or proceeding."

It is peculiarly fitting that the plaintiff, itself a National bank, should submit, in matters of detail intended for the common benefit of such institutions, to the will of the law-making power under which it was created and is operated.

There is nothing in rule 34 which can affect the result. Formerly that rule required proof, where the summons had been served by publication, of the issuing of an attachment, etc.

It may be a question whether this did not require more in actions against foreign corporations than did sections 134 and 135 of the Code above cited, and whether in such cases, and to that extent, the rule was not in conflict with such actions.

But at all events the rule has been amended, and, as it now reads, such proof is only required "if the case be one in which an attachment may be issued." This, as we have seen, is not such a case.

The motion to vacate the attachment must, therefore, be granted, with \$10 costs.

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Seeley v. The New York Exchange National Bank.

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## SEELEY V. THE NEW YORK EXCHANGE NATIONAL BANK.\*

*Reduction of capital stock.*

Where a National bank reduces its capital stock it cannot retain as a surplus fund, or for other purposes, the whole or any portion of the money which it receives for the stock which is retired.

VAN HOESEN, J. Section 5143 of the Revised Statutes of the United States provides that a National banking association may reduce its capital stock. The principal question in this case is, whether a National bank may, after reducing the amount of its capital stock, retain as a surplus, or for other purposes, the whole or any portion of the money which it received for the stock that is retired? The defendant reduced its capital stock from \$500,000 to \$300,000. What is to become of the \$200,000 which was subscribed and paid for the stock that has been called in? Must it be paid to the stockholders who surrender the retiring stock, or may it be retained by the bank? A certificate of stock is merely the evidence of an interest in dividends as they are declared, and of a right to a *pro rata* distribution of the effects of the corporation on hand at the expiration of the charter. Angell and Ames on Corporations (8th ed.), § 560.

If the defendant had determined to discontinue business and wind up its affairs, there is no doubt that the shareholders would be entitled to a distribution of whatever assets of the corporation might remain after its debts had been paid. If, instead of surrendering *all* its corporate powers, a corporation, by reducing its capital, relinquishes a portion of them, it seems to me that the shareholders may properly claim a distribution of the money which the corporate body has no longer the right to use as capital. The abandonment by a corporation of all its corporate rights gives the stockholders a right to the distribution of all the net assets; why should not an abandonment of a portion of those rights give the stockholders a right of distribution *pro tanto*? Of course, if the capital stock has been impaired, the amount to be returned to the stockholders must be diminished.

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\* This case is not otherwise reported.

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Seeley v. The New York Exchange National Bank.

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It is said that the capital of the defendant has not been impaired, but that the directors deem it advantageous to retain as a surplus one-half of the amount which was subscribed and paid for the stock which has been called in. The reason assigned is not, in my opinion, any justification for withholding from the plaintiff his share of the money that was paid in exchange for the stock that is retired. That money was paid as capital, and if it be not required for the payment of debts, it has accomplished the end for which it was subscribed, and it ought to be returned to the shareholders. The bank has gone out of existence as a corporation with a capital of \$500,000. Under a modified charter it commences a new life, with a capital of \$300,000. So far as the \$200,000 of reduced stock is concerned, the corporation must be considered as having surrendered its charter and wound up its business. This being so, there is no doubt of the duty it owes to the stockholders who own the retired stock.

The able counsel for the defendant insists that it is discretionary with the directors either to return the money to the shareholders, or to retain it as a surplus; and that by retaining it the bank does the plaintiff no injury, inasmuch as his shares will increase in market value as they diminish in number, and as he will own one two-hundredth part of the new capital stock just as he owned one two-hundredth part of the old capital stock. It is true that his proportion of the capital stock will relatively be as great as before the reduction, but it is altogether a matter of conjecture as to the future market value of a share of the reduced stock. The return of the retired capital to the shareholders is not, however, a subject for the exercise of a director's discretion. If the retired capital be a liability of the corporation in favor of the shareholders who give up the stock that is called in, the payment of that debt cannot be in any man's discretion. Payment cannot be deferred because the directors believe it for a creditor's advantage to keep him out of his money.

Where a dividend has once been declared, the directors cannot afterward refuse to pay it because they have determined to establish a surplus fund with a view to benefit the corporation and its stockholders. The dividend, when declared, becomes a debt, and cannot thenceforth be disposed of without the consent of him who is entitled to it. *Beers v. Bridgeport Spring Co.*, 2 Weekly Digest, 8.

## Ruffin v. Board of Commissioners.

It would be strange if capital — capital which has accomplished its mission — could be diverted from its owners, and used against their protest to build up a surplus fund, when even a dividend, once declared, cannot be.

The controversy in this case really is, whether or not the defendant shall be compelled to pay the plaintiff the value of five shares, the amount which the directors have determined to retain as a surplus. If directing judgment for the value of those shares would bring the litigation to a close, I should go no further than make an order to that effect. But it appears to be necessary to provide for the indemnification of the plaintiff for the loss of his twenty-five shares, the transfer of which the defendant refuses to make upon its books. If I should order judgment merely for the value of the five shares, it is possible that the defendant would refuse to give the plaintiff a new certificate for fifteen shares, and to pay him the \$500 which the directors have ordered to be paid to those who consent to relinquish two-fifths of their shares. To give the plaintiff adequate relief, it seems to me to be necessary to direct judgment for the value of the whole twenty-five shares. The defendant is liable for that value, having refused to permit the shares to be transferred upon its books.

*Judgment for the plaintiff.*

## RUFFIN V. BOARD OF COMMISSIONERS.

(69 North Carolina, 498.)

*Taxation of circulation of National banks.*

The power of a State to tax the circulation of the National banks depends upon whether such circulation is for the use of the United States government or for private profit. Congress can protect the circulation of those banks, by forbidding the States to tax it; until this is done the States have the right to tax it.\*

**P**ETITION by the plaintiff to the board of commissioners of Orange county, praying a revision and correction of the list of taxables given in by her.

The court below ordered a correction of the tax list.

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\* This decision is only an *obiter dictum*. The court expressed a like opinion in *Lily v. The Commissioners*, 69 N. C. 300.

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Ruffin v. Board of Commissioners.

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*T. L. Hargrove*, for board of commissioners.

*John W. Graham*, *contra*.

READE, J. [After deciding that money deposited became the money of the bank and was taxable to the depositor only as "credit."] The point most discussed at this bar was whether United States treasury notes and National bank bills were liable to taxation by the State. And, although, as we have seen, it is not necessary to the decision of the case, yet, as his honor's judgment was based upon it, and as it is a matter of general interest, it may be proper that we should express our opinion upon it. It seems to be settled by numerous cases in the United States Supreme Court, cited in plaintiff's brief, beginning with *McCullock v. The State of Maryland*, that United States treasury notes cannot be taxed by the State, because they are of the means used for the support and administration of the United States government. And if a State could tax them, then unfriendly States might *so* tax them as to destroy their usefulness; and in that way, and to that extent, destroy the United States government. And it is equally well settled that the United States government cannot tax any of the necessary means used to administer the State government. But whether a State can tax National bank bills seems to be a debatable question. The case cited against the power of the State to tax is *Veazie Bank v. Fenno*, 8 Wall. 533 (*ante*, p. 22). We do not think that case supports the position. It is there decided by a divided court, that Congress may tax the circulation of banks chartered by the State; and *that*, although the tax was so heavy—about sixteen *per cent*—as to destroy them. It is not pretended that this tax could have been imposed if the bank had been chartered for the use of the State and as a means of administering its government. But it is put upon the ground that they are corporations for private profit.

And the power of Congress to tax the circulation of State banks depends upon whether they are for the use of the State government or for private profit; so the power of the State to tax the circulation of National banks depends upon whether they are for the use of the United States government or for private profit. It is true they are authorized by Congress, as a currency, convenient and useful for circulation, just as State bank bills are authorized by the State. But in neither case have they necessarily any connection

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with the government. The act of Congress authorizing National banks imposed a tax on their circulation of two per cent. And surely that would not have been done if they had been regarded as a part of the government, as that would have been the same as for the government to tax itself. The truth is that the United States government has no interest in National banks. It authorizes them in order to provide a currency, not for the government, but for the people. And it has the power to regulate and to protect them. To this end it provides for the redemption of their notes, protects them from the imposition of counterfeits and from injurious competition of State banks, by a heavy tax on State bank bills, and no doubt might further protect them by forbidding the State to tax them. But this has not been done, and until it is done we suppose the State has the power to tax them. It seems that all that is to be inferred from the decision in *Veazie Bank v. Fenno, supra*, is not that National bank bills are exempt, but that Congress has the power to exempt them from State taxation. See *Lilly v. Commissioners of Cumberland*, at this term, 69 N. C. 300.

PER CURIAM.

*Order of the court below reversed.*

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KYLE v. THE MAYOR, ETC.

(75 North Carolina, 445.)

*Taxation of shares of non-residents.*

Under a State Constitution requiring all property not specifically exempt, to be taxed, State assessors must tax the shares of National bank stock belonging to non-residents of the State in the city or town where the bank is located, although there is no State statute expressly directing such taxation.

THIS was a civil action, for injunction and other relief, heard before his honor, Judge BUXTON, at Chambers, in Cumberland county, on the 20th day of November, 1875.

Plaintiff alleged in his complaint that he is a non-resident of the State; that he was the owner of 108 shares of stock of the People's National Bank of Fayetteville," on April 1st, 1875; that the same



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had been placed by the tax list takers for the town of Fayetteville upon the tax list, and that plaintiff had been assessed the sum of \$182.50 as taxes thereon; that the tax list had been placed in the hands of the defendant Mallett for collection, and that he had levied upon certain real estate of the plaintiff, and advertised the same for sale, to satisfy said tax assessment. Plaintiff asked that defendants be restrained from selling said property, etc.

Upon this complaint his honor granted a restraining order, and an order to defendants to show cause on November 20th, why an injunction should not be granted as prayed for.

Defendants in their answer admitted the main allegations of the complaint, but they insisted that the tax assessed on plaintiff's shares of stock was uniform and at the same rate as was levied upon all other property subject to taxation in the town of Fayetteville, and that the same was valid and according to law.

Upon the hearing, his honor held that the assessment for taxation of plaintiff's shares of stock by the authorities of the town of Fayetteville, and all proceedings thereunder were without authority of law, and granted the injunction.

From which order defendants appealed.

*Ray*, for appellant.

*McRae & Broadfoot, contra.*

BYNUM, J. It is admitted that the town of Fayetteville possesses the power of taxation for corporate purposes, by virtue of its charter and the general laws of the State.

This concession, we think, is decisive of the case before us. For whenever the power is exercised, all taxes, whether State, county or town, by force of the Constitution, must be imposed upon all the real and personal property, money, credits, investments in bonds, stocks, joint-stock companies, or otherwise, situate in the State, county or town, except property exempted by the Constitution. Art. 5, §§ 3 and 7; art. 7, § 9.

It is the provision, and was the purpose of the Constitution, that thereafter there should be no discrimination in taxation in favor of any class, person, or interest, but that every thing, real and personal, possessing value as property, and the subject of ownership, shall be taxed equally and by a uniform rule.

In this respect the present Constitution shows no favors and allows no discretion. If, then, the town of Fayetteville has the power to tax, the Constitution steps forward and commands that *all* property shall be taxed and by a uniform rule. Shares in a National bank are investments in stocks, and comprise the largest portion of the moneyed wealth of the country. They are not only a proper subject of taxation in themselves, but are made taxable expressly both by the Constitution of the State and the National Banking Act which brought them into existence and stamped upon them their character. *National Bank v. Commonwealth*, 9 Wall. 353; 4 id. 244. The Banking Act, ratified the 3d of June, 1864, and amended by an act ratified the 10th of February, 1868, confers upon the *States in which they are located* the power of taxing the shares in National banks. There are two restrictions upon the power. The first is, that the tax shall be no greater than is imposed upon other moneyed capital in the hands of individual citizens of such State. The second is, that shares owned by non-residents of any State shall be taxed *in the city or town where the bank is located and not elsewhere*. Therefore, if non-resident shareholders are not taxed in the State, county and town where the bank is, they escape taxation altogether. Taxation is prohibited in the State of the non-resident. Such gross inequality and injustice was never intended and is expressly provided against. By the Banking Act it is wholly immaterial where the shareholder lives. The taxing power looks, not for the individual, but for the bank. Where that is found the shares are taxed by the State, county or city of its locality.

In our view it was unnecessary for the Revenue Act of the State or the charter of the town of Fayetteville to tax specifically the National bank shares of either residents or non-residents.

Whenever and wherever these institutions spring into existence, and become the heads of moneyed investment and the representatives of wealth, the Constitution seizes them and exacts from them their proportional share of the public burdens. Neither the Legislature nor the town corporation can exempt them from taxation without doing violence to the Constitution.

In the view we have taken of this case, it is unnecessary to examine the several revenue and other acts of the Legislature, cited and commented upon in the argument. It is enough to know, first, that Congress has impressed these bank shares with the

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character of taxable property in the States where located; second, that the Constitution of the State requires that all the property of the plaintiff in the State, including these investments, is to be taxed equally; and third, that the town of Fayetteville possesses the power to tax, and has levied the tax upon the bank shares, *ad valorem*, and uniform, as upon other property.

It is not alleged that the town tax is not uniform with the tax upon similar property, or that the assessment is in excess of that made by the township trustees. No point is made upon that. But it is proper to say, that all assessments of property for taxation, under the Constitution, must be made by the township board of trustees. Art. 7, § 6.

We have heretofore decided that this board must assess the value of property for State and county taxation, and we think, for the same reasons of convenience and uniformity, that city and town taxation should be based upon the same valuation as that for the State and county. *Wil., Col., & A. A. R. R. Co. v. Commissioners of Brunswick*, 72 N. C. 15.

There is error. Judgment reversed, injunction dissolved and action dismissed.

PER CURIAM

*Judgment accordingly.*

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THE FIRST NATIONAL BANK OF COLUMBUS, plaintiff in error, v.  
GARLINGHOUSE *et al.*

(22 Ohio State, 492.)

*National banks not bound by State usury laws — Promissory notes — Discharge of sureties.*

National banks organized under act of Congress are not bound by the usury laws of the States in which they are situated.\*

The discounting of a promissory note by a National bank, at an unlawful rate of interest, does not render the note void *in toto*, but only to the extent of the interest.

The discounting of a note for the principal maker, at an unlawful rate of interest, is not such an unauthorized use of the note as will discharge the

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\* See *Farmers and Mechanics' National Bank v. Dearing*, ante, p. 117.

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sureties from liability. In the absence of any express agreement or understanding on that subject between the sureties and the principal, of which the holder had notice, or any intention to practice a fraud on the sureties, they must be held to have trusted to the judgment and discretion of the principal, as to the terms on which the note might be discounted.

**E**RROR to the Court of Common Pleas of Delaware county. Reserved in the District Court for decision in the Supreme Court.

The plaintiff in error brought an action in the Court of Common Pleas against the defendant in error, upon a joint and several promissory note for \$6,000, dated Columbus, Ohio, November 13, 1867, made by George Garlinghouse, Daniel Hunt, James Budd and Jonathan Bateson, and payable to the order of George Garlinghouse, on the 1st of March, after date, without grace. It was indorsed by Garlinghouse.

The defendants, Hunt and Bateson, filed an answer, containing five defenses. The first was *nil debet*, because they alleged that they executed the note as sureties only for Garlinghouse and for his accommodation, for the purpose only of having the same discounted, or money borrowed thereon at the rate of interest allowed by law in the State of Ohio, being six per cent per annum; that on or about the 13th day of November, 1867, the plaintiff, well knowing that said defendants were sureties only for Garlinghouse, upon said note, by agreement of Garlinghouse only, without the defendant's knowledge or consent, discounted the same for the sole use and benefit of said Garlinghouse; and on said discount took and reserved from him, as interest for the money loaned him upon said note, for the time the same had to run, a greater rate of interest than six per cent per annum, the rate allowed by law in Ohio, to wit, interest at the rate of over nine per cent per annum, being the sum of \$137.50; that the interest so taken and reserved by the plaintiff was usurious and illegal, done only by agreement of the plaintiff and Garlinghouse, without the knowledge or consent of the defendants, and in fraud of their rights as sureties of Garlinghouse.

The fourth defense was *nil debet*, because the defendants alleged that the plaintiff was an association formed under the act of Congress to provide a National currency, etc., approved June 3, 1864, located and doing business at Columbus, Ohio; that by the provisions of said act the plaintiff was authorized to take, receive, re-

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serve and charge upon any loan or discount made by it, or upon any note, etc., interest at the rate of six per cent per annum, that being the rate of interest allowed by law in the State of Ohio, and no more; that the defendants executed the note in suit, as sureties only, for said Garlinghouse; that the plaintiff discounted the note for Garlinghouse; and on such discount took, received, reserved and charged more interest than six per cent per annum, to wit, interest at the rate of over nine per cent per annum, and the defendants alleged that the loan and discount so made for Garlinghouse by the plaintiff, of said note, was unauthorized by the provisions of the act of Congress and contrary thereto, and was illegal and void.

To each of said first and fourth defenses the plaintiff demurred. The court rendered judgment, overruling the demurrers, and dismissing the action as to said Hunt and Bateson, with costs.

*R. A. Harrison*, for plaintiff in error.

*Carper & Van Deman, L. English, J. Wm. Baldwin, and Reid & Powell*, for Hunt and Bateson.

WHITE, C. J. The plaintiff is a banking corporation organized under the act of Congress "to provide a National currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June 3, 1864. 13 Stat. at Large, 99.

The judgment of the court below is sought to be sustained on three general grounds :

First. That the note in question, having been discounted by the plaintiff at an unlawful rate of interest, is void under the act of Congress referred to.

Second. That, if not void under the act, the note is void under the statute of this State, passed March 19, 1850, entitled "an act to restrain banks from taking usury." 1 S. & C. 149.

Third. That the defendants being sureties, the discounting of the note by the plaintiff for their principal, at an unlawful rate of interest, was an unauthorized use of the note which discharged them from liability thereon.

These grounds we will consider in their order.

1. The sections of the National Banking Law preceding section 8, prescribed the mode in which associations may be formed "for

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carrying on the business of banking." By section 8, the associations so formed are, among other things, authorized to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits, by buying, selling exchange, coin, and bullion; by loaning money on personal security; by obtaining, issuing, and circulating notes, according\* to the provisions of the act, etc.

Section 30 is a limitation of the general powers specified in section 8; and on the construction of the former section, the question now under consideration depends.

Section 30 is as follows :

"§ 30. And be it further enacted, that every association may take, receive, reserve, and charge on any loan or discount made, or upon any note, bill of exchange, or other evidence of debt, interest at the rate allowed by the laws of the State or territory where the bank is located, and no more, except that where, by the law of any State, a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized in any such State under this act. And when no rate is fixed by the laws of the State or territory, the bank may take, receive, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run. And the knowingly taking, receiving, or reserving, or charging a rate greater than aforesaid, *shall be held and adjudged* a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back in an action of debt twice the amount of the interest thus paid, from the association taking or receiving the same. *Provided*, that such action is commenced within two years from the time the usurious transaction occurred. But the purchase, discount or sale of a *bona fide* bill of exchange, payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange, payable at another place than the place of purchase, discount or sale, at not more than the current rate of exchange for sight drafts, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest."

This section is a substitute for section 46 of the original act of February 25, 1863; and in giving construction to the section as found in the present act, it is worthy of remark that the forfeiture, as declared by the original act, was of the entire debt or demand on which the interest was taken, reserved or charged.

The effect of agreeing for unlawful interest, as the section now stands, is quite obvious. The forfeiture is expressly limited to the

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interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. In thus limiting the forfeiture to the interest, the right of the bank to the principal is necessarily implied. And, so far as the argument as to the entire invalidity of the note is founded on the supposed want of power or capacity in the bank, it is enough to say that authority implied is as effective and available as authority expressly conferred.

The statute operates on the instrument given for the loan, and, in effect, declares it to be invalid as to the entire interest, but valid and binding as an obligation for the payment of the principal.

The construction we give to the statute now under consideration renders the decision in the case of *The Bank of Chillicothe v. Swayne et al.*, 8 Ohio, 286, and the subsequent cases referred to, recognizing the same principle, inapplicable to the present case. In each of those cases the contract was declared void, not because of any illegal element or stipulation entering into the consideration of the instrument, but for want of *legal capacity* on the part of the corporation conferred by its charter. *Selser v. Brock*, 3 Ohio St. 306.

We have not overlooked the recent case of *First National Bank of Whitehall v. Lamb*, decided by the Court of Appeals of New York, 50 N. Y. 95. We have considered the opinion in that case with the respect due to the learned tribunal in which it was pronounced. But, after an attentive consideration of it, we are unable to concur in the views therein expressed as to the true construction of the act of Congress now in question. The question decided in the case was that the contract then in controversy was void under the usury laws of New York. The contract was usurious, both under the laws of the State and the law of Congress. The usurious part of the transaction was forbidden by both laws, the difference in their operation being as to the extent of the penalty or forfeiture. The statutes of New York declare void all contracts reserving a greater rate of interest than seven per cent per annum, and preclude a recovery thereon of either principal or interest. In this State we have no such statute. Whether, therefore, it is competent for the State to impose additional penalties for forfeitures to those prescribed by Congress, where the authority given by Congress has been exceeded in the usurious transaction, is a question which does not arise in this case, and as to which we express no opinion.

The construction given to section 30, in *Bank of Whitehall v. Lamb*, to which we dissent, is in limiting the operation of the clause declaring the forfeiture of States and territories, where, by the local law, no rate of interest is fixed.

The preceding clauses prescribe the rate of interest to govern in all cases. Where the local law prescribes no rate of interest, it is declared that the rate allowed shall be seven per centum. In all other cases, the rate fixed by the local law is adopted by Congress to govern the National banks. It seems to us that, upon a fair construction of the section, the operation of the clause declaring the forfeiture, must be regarded as co-extensive with the authority conferred in the preceding clauses as to exacting interest; and as applying to all loans and discounts made under these clauses, irrespective of the locality in which they were made.

The construction given to the section in the opinion referred to, of the Court of Appeals, seems to have been influenced by the idea that, unless the forfeiting clause was limited to cases where, by the local law, no rate of interest is fixed, the provision would be unconstitutional. But we do not perceive that the question of constitutional power is varied by such limitation. If, in the absence of a State law fixing the rate of interest, Congress has power to prescribe a rate of interest for the banks, and the consequences of taking interest in excess of the rate allowed, the power must be derived from the Constitution of the United States; and, if so derived, its exercise cannot be made dependent on State authority. If, therefore, the power exists in Congress to prescribe for the National banks a rate of interest in any of the States, the power must exist to the same extent in all the States, irrespective of the rates prescribed by State laws.

The question, whether Congress had power to establish the National banks, must be regarded by the judicial tribunals as settled by the repeated decisions of the Supreme Court of the United States. *McCulloch v. The State of Maryland*, 4 Wheat. 316; *Osborn v. United States Bank*, 9 id. 738; *Veazie v. Fenno*, 8 Wall. 533.

In speaking of the faculty of lending and dealing in money, which Congress was authorized to confer upon the United States Bank, Chief Justice MARSHALL uses this language:

“Why is it that Congress can incorporate or create a bank? This question was answered in the case of *McCulloch v. The State of Maryland*. It is an instrument which ‘is necessary and proper’



for carrying on the fiscal operations of the government. Can this instrument, on any rational calculation, effect its object unless it be endowed with that faculty of lending and dealing in money which is conferred by its charter? If it can, if it be as competent to the purposes of government without, as with, this faculty there will be much difficulty in sustaining that essential part of the charter. If it cannot, then this faculty is necessary to the legitimate operations of government, and was constitutionally and rightfully engrafted on the institution. It is, in that view of the subject, the vital part of the corporation; it is its soul; and the right to preserve originates in the same principle with the right to preserve the skeleton or body which it animates. The distinction between destroying what is denominated the corporate franchise, and destroying its vivifying principle, is precisely as incapable of being maintained, as a distinction between the right to sentence a human being to death, and a right to sentence him to a total privation of sustenance during life. Deprive a bank of its trade and business, which is its sustenance, and its immortality, if it have that property, will be a very useless attribute.

"This distinction, then, has no real existence. To tax its faculties, its trade and occupation, is to tax the bank itself. To destroy or preserve the one, is to destroy or preserve the other. \* \* \*

"The currency which it (the bank) circulates, by means of its trade with individuals, is believed to make it a more fit instrument for the purpose of government than it could otherwise be; and if this be true, the capacity to carry on this trade is a faculty indispensable to the character and object of the institution." 9 Wheat. 861-4.

In *Veazie v. Fenno*, *supra*, in the opinion delivered by the present chief justice, referring to the National banking system, it is said :

"The methods adopted for the supply of this currency were briefly explained in the first part of this opinion. It now consists of coin, of United States notes, and of the notes of the National banks. Both descriptions of notes may be properly described as bills of credit, for both are furnished by the government; both are issued upon the credit of the government; and the government is responsible for the redemption of both; primarily as to the first described, and immediately upon default of the bank as to the second. \* \* \*

Having thus, in the exercise of undisputed

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constitutional powers, undertaken to provide a currency for the whole country, it cannot be questioned that Congress may constitutionally secure the benefit of it to the people, by appropriate legislation."

It being thus established that Congress can provide a National currency through the agency of the banks, and authorize them to put it in circulation, it seems to us necessarily to follow that it can prescribe the terms or rate of interest upon which it is to be supplied and kept in circulation.

The power to create implies the power to preserve. The lending of the currency they issue is a vital element in the system of National banks, and the right to take interest is a necessary incident of the power to loan. If the States can, in derogation of the act of Congress, limit the capacity or right of the banks as to the rate of interest they may charge, the States would seem to have plenary power over the whole subject; and could so exercise it, if they saw proper, as to destroy, for all practical purposes, the value of the franchise. The power would seem to extend not only to prescribing the rate of interest, but to include also authority to prescribe the character of the securities to be discounted by the banks, and the terms in all other respects on which they were to exercise the power to loan.

2. The next question is, whether the statute of this State, of March 19, 1850, already referred to, affects the note now in question. We are clearly of opinion that it does not. The third section of the act, which is the only one that can be supposed to have any application, was intended to operate on banking institutions in this State whose authority to discount or purchase notes, bills or other evidences of debt, was subject to the control of the legislation of this State, and was intended to limit such authority. It imposes no penalty. It has no application to banking institutions existing and exercising their power under the authority of Congress.

3. The remaining question is, whether the discounting of the note, at an illegal rate of interest, was such a misuse of the note as discharged the defendants as sureties from liability.

This question was determined in the negative by this court, in *Selser v. Brock*, 3 Ohio St. 302. It was held in that case, that where a joint and several promissory note in blank is signed by several persons as sureties, and delivered to the principal debtor,

to be by him filled up and given to the payee, if an illegal rate of interest be agreed upon between the principal debtor and the creditor, and incorporated in the amount for which the note is made payable, the contract is voidable to the extent of the usury only, and creates a binding obligation on the part of the surety for the principal and legal interest, whether the usury be inserted with the knowledge and consent of the surety or not.

Usury, it is said in the opinion, will not avoid a contract as to a surety beyond the extent to which it is vitiated as to the principal. And it may be remarked that, in this State, the effect of usury is not to vitiate the entire contract, but only to the extent of the usury.

It may be inferred from the answer that the note in the present case was filled up at the time it was signed by the sureties. But it can make no difference in principle whether the note is made to cover illegal interest by filling it up, if it is in blank, for a larger amount than the actual loan and lawful interest, or, where it is already written out, by diminishing the amount of the actual loan. The effect is the same in either case.

It is not averred in the answer that there was any agreement between the defendants and Garlinghouse, the principal, that the note was not to be used unless it could be discounted at the legal rate of interest. The averment is that the defendants executed the note for the accommodation of their principal, for the purpose only of having it discounted at that rate. Whether this purpose was communicated to the principal does not appear. In the absence of any express agreement or understanding between the sureties and the principal, of which the creditor had notice, and of any intention to practice a fraud on the sureties, they must be held to have trusted to the judgment and discretion of the principal as to the terms on which the note might be discounted.

*Judgment reversed, and cause remanded for further proceedings.*

DAY, J., did not sit in this case.

SHUNK, plaintiffs in error, v. THE FIRST NATIONAL BANK  
OF GALION.

(22 Ohio State, 508.)

*National banks — Usury — Forfeiture of interest — State banks.*

Under section 30 of the National Currency Act (13 Stat. at Large, 108), the taking or charging a rate of interest greater than six per cent per annum, in advance, by a National bank located in Ohio, is a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon; as well the interest accruing after maturity and before judgment, as the interest which accrued before the maturity thereof.

A National bank is limited, in its right to take or charge interest on its loans and discounts, to the rate of interest allowed by the State laws to banks of issue organized under those laws, if the rate so allowed is different from the general rate allowed by the laws of the State.

ERROR to the District Court of Cuyahoga county.

THE original judgment was rendered upon a cognovit, in the Court of Common Pleas of Cuyahoga county, on the 23d of November, 1871, in favor of the First National Bank of Galion against Shunk and others, for \$2,183.50 and costs, upon a note for \$2,000, dated October 1, 1870, payable to said bank, one year after date, with interest at the rate of eight per cent from date. Shunk and others moved to vacate the judgment, for the reason, among others, that usurious interest had been included therein. The plaintiff in the action entered a remittitur, upon the record, for the sum of \$165.83, being the interest, at the rate of eight per cent, from the date to the maturity of the note, and two per cent of the interest thereon, from its maturity to the date of the judgment. The court thereupon overruled the motion, and awarded execution on the judgment for \$2,017.67, being the principal of the note and six per cent interest thereon from its maturity to the entry of the judgment.

The defendants excepted to the ruling and judgment of the court, and tendered a bill of exceptions, and prosecuted their petition of error in the District Court, which resulted in an affirmance of the judgment below.

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This action was prosecuted to reverse the judgment of affirmance, and also the original judgment of the Court of Common Pleas. And it was, among other things, alleged by the plaintiffs, that it was error to include in the judgment upon the note any interest whatever accruing before the rendition of the judgment.

*A. K. Dunn and James Marshman*, for plaintiffs in error.

*H. C. Carhart and Jacob Scroggs*, for defendant in error.

MCLVAIN, J. Was the plaintiff in the original action entitled to have interest at the rate of six per centum per annum, from the maturity of the note to date of judgment, included in the judgment?

The First National Bank of Galion was organized within the State of Ohio, under the act of Congress of June 3, 1864, commonly called the National Currency Act. The 13th section of this act provides certain rules by which the rate of interest is to be ascertained and fixed, which National banks are allowed to take, receive, reserve and charge on loans and discounts made on notes, bills of exchange or other evidences of debt, and then declares that "the knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid, shall be *held and adjudged* a forfeiture of the *entire* interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon." According to our understanding of this provision, it is made the duty of the court having jurisdiction of an action brought on a note, bill, or other evidences of debt, discounted by a National bank at a rate of interest greater than that allowed by law, or if an agreement has been made to pay such greater rate of interest thereon, to hold and adjudge the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon, to be forfeited; as well the interest accruing after maturity and before judgment, as the interest which accrued before the maturity thereof.

The rate of interest, which the note in this action carried with it, and which was agreed to be paid thereon, was "eight per cent from date." Was this rate of interest greater than that allowed to the defendant in error, under the rules established by section 30 of the Currency Act?

The section reads as follows :

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“That every association may take, receive, reserve and charge on any loan or discount made upon any note, bill of exchange or other evidences of debt, interest at the rate allowed by the laws of the State or territory where the bank is located, and no more, except that where, by the laws of any State, a different rate is limited for banks of issue, organized under State laws, the rate so limited shall be allowed for associations organized in any such State under this act, and when no rate is fixed by the laws of the State or territory, the bank may take, receive, reserve, or charge a rate not exceeding seven per centum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt has to run.”

It is quite certain, we think, that the defendant in error was limited, by the provisions of this section, in its right to take or charge interest on its loans and discounts, either to the rate of interest fixed by the first rule named therein, or to the rate fixed by the exception to that rule. In other words, it was limited to the rate of interest allowed by the State laws to banks of issue, organized under the laws of the State, if the rate so allowed was different from the general rate allowed by the laws of the State; but if there was no difference between such rates, or if there was no rate limited for banks of issue organized under State laws, then, and only then, was the defendant in error entitled to take or charge the general rate allowed by the laws of the State.

By the act of the Legislature of this State, passed March 21, 1851, known as the Free Banking Act (S. & C. 168), and also the act of March 9, 1850 (S. & C. 149), which contain special provisions for the organization and regulation of banks of issue, and limit their powers in respect to taking and charging interest on loans and discounts, the maximum rate allowed is fixed at six per centum per annum in advance. Such, also, was the rule under the act of February 24, 1845, known as the State Bank of Ohio Act (S. & C. 117), which was in force at the date of the passage of the National Currency Act. Indeed, the general policy of the State has ever been to limit the rate of interest allowed for banking corporations at six per centum per annum. True, we are not advised, in the record of this case, whether banks, organized under the act of March 21, 1851, or under any other statute, are still engaged in issuing bank paper. But we suppose it matters not, as that act, at least, is still in force.

Now, from what we have already said, it must follow that National banks located in this State are limited by the six per cent rule thus established by these special enactments, unless the pro-

visions of the first section of the general act of May 4, 1869 (66 Ohio L. 91), extend to and embrace banks of issue, organized under those special and particular statutes. It provides "that the parties to any bond, bill, promissory note or other instrument of writing, for the forbearance or payment of money at any future time, may stipulate therein for the payment of interest upon the amount of such bond, bill, note, or other instrument of writing, at any rate not exceeding eight per centum per annum, payable annually."

Although the terms of this section are sufficiently comprehensive to include banks of issue among the parties authorized to stipulate for eight per cent interest, yet, inasmuch as the statute was passed as a substitute for one that clearly did not relate to such banks, and inasmuch as the provisions of prior statutes specially limiting the rate of interest allowed to such banks were not expressly repealed or modified thereby, we are of opinion that the Legislature did not intend to change the rule or enlarge the powers of banking corporations in respect to the taking or charging of interest on loans and discounts. In thus holding, we adopt and approve the principle of the rule laid down in *Fosdick v. Perrysburg*, 14 Ohio St. 472, and other cases, to wit: "That a subsequent statute treating a subject in general terms, and not expressly contradicting the provisions of a prior act, shall not be considered as intended to affect the more particular and positive provisions of the prior act, unless it be absolutely necessary to do so in order to give its words any meaning."

Our attention has been called to the case of *Parks et al. v. First National Bank of Missouri*, as reported in the Bankers' Magazine for December, 1870, page 416, wherein it is said that the Circuit Court of the United States for Missouri held, in substance, that a National bank located in a State where one rate of interest is allowed by law, generally, and another is fixed for banks of issue organized under the State laws, may take, receive, reserve, or charge the greater rate. We cannot approve this construction of the 30th section of the National Currency Act. The clause, "except where by the laws of any State a different rate is limited for banks of issue organized under State laws, the rate so limited shall be allowed for associations organized in any such State under this act," is not a mere qualification of the preceding phrase "and no more." But, on the contrary, it was intended as an exception to

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the preceding rule, and as a substitute for such rule in all cases where a National bank is located in a State where a different rate of interest is fixed for local banks, from that allowed generally. We are satisfied that Congress not only intended to place National banks and State banks upon a perfect equality in this respect, but further intended to adopt the policy and views of the people of the several States as expressed by their legislation in regard to the rate of interest to be allowed for banking corporations.

The judgment of the District Court must be reversed, and unless the defendant in error, within thirty days, remit from the judgment of the Court of Common Pleas all interest included therein, that judgment will also be reversed.

WHITE, C. J., and WEST, J., concurred. WELCH, J., dissented. DAY, J., did not sit in this case.

*Judgment reversed.*

## SHINKLE v. THE FIRST NATIONAL BANK OF RIPLEY.

(22 Ohio State, 516.)

*Usury — Right of National banks to take notes and mortgages — Counter-claim for illegal interest, when barred.*

The reservation of illegal interest by a National bank does not avoid the principal.

Defendant being indebted to a National bank on certain promissory notes made a new note and a mortgage to secure it, which were, by an agreement with the bank and for its use and benefit, executed and delivered to one S. without consideration from him, who also, without consideration, transferred them to the bank, and the old notes were thereupon delivered up and canceled. *Held*, (1) that there was a sufficient consideration for the note and mortgage; (2) that the bank had power to take notes and mortgages in such way and form for the purpose of securing its claim.

Where the two years within which an action lies to recover back twice the amount of illegal interest paid to a National bank have elapsed, the right to offset such interest against any claim of the bank is also barred.\*

\* *Brown v. Second National Bank*, post; *Overholt v. First National Bank*, post; *Lucas v. Government National Bank*, post; *Higley v. First National Bank*, post.



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**M**OTION for leave to file a petition in error to the District Court of Brown county.

The original case was an action by the bank, against Shinkle and wife, to recover the amount of Shinkle's promissory note for \$1,400, and to foreclose a mortgage executed by him and his wife to secure its payment. The note and mortgage were dated August 24, 1867, and were both executed and delivered to one A. J. Stires, and by him assigned and transferred to the bank.

The defenses set up were, that the rate was made without consideration; that the bank was not the owner of the note; and that it included, or was given in part for, usurious interest. Issues were taken on these several matters of defense, and on the trial the court, to which the cause was submitted without the intervention of a jury, made a special finding of the facts. These facts are substantially as follows:

The plaintiff in error, John G. Shinkle, with Walter L. Shinkle and Barton B. Shinkle, were partners under the name of J. G. Shinkle & Co. Prior to the date of the note and mortgage in suit, the firm had two several loans of money from the defendant in error — one for \$5,000, dated July 25, 1864, and the other for \$6,768, dated December 30, 1865. They had also made a loan of \$1,600 from the Farmers' National Bank of Ripley, Ohio, dated March 26, 1867. On each of these loans Michael Shinkle was surety, and on each interest was charged and reserved at the rate of ten per cent. These loans were continued, by renewing the notes given for them from time to time, at the same rate of interest, down to the time of executing the note and mortgage in suit. The Shinkles then being unable to pay their debts, and having lately, at the request of these two banks, made an assignment of their property for the benefit of creditors, by agreement of all the parties to these loans, an arrangement was entered into as follows:

The aggregate amount due on the three loans, including the illegal interest, was divided into four several sums, in proportions agreed upon and arranged between the Shinkles themselves, of which portions each was to assume and pay one, in five annual installments, at six per cent interest, and to secure the same by mortgage on his individual property, with a proviso that, if the interest should not be paid at the end of each year, the principal sum should become due in two years and six months. The portion thus assumed and agreed to be secured and paid by said John

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G. Shinkle was \$1,400, and it was for the security and payment of that sum, and in fulfillment of said agreement on his part, that the note and mortgage in suit were executed. The portion so assumed and secured by Walter L. Shinkle was \$4,400; that assumed and secured by Barton B. Shinkle, \$4,000; and that assumed by Michael Shinkle, \$4,765.

The notes and mortgages were all executed and delivered according to this agreement, and by the consent of the two banks, and for their use and benefit, were executed and delivered to Stivers, without any consideration moving from Stivers, and were transferred by him to the defendant in error without any new consideration, and by consent of all parties; and by like consent the old notes were canceled and given up.

On this finding of facts, the court rendered a judgment in favor of the defendant in error, for the amount of the note in suit, without interest, but including the usurious interest so incorporated in the note.

*White & Waters*, for motion.

*Baird & Young*, contra.

WELCH, J. [After deciding another point.] But the plaintiffs in error insist that, upon the facts found, the bank was entitled to no judgment: (1) because the original notes for which, in part, the note in suit was given, were void for usury; (2) because the bank was not authorized by its charter to take a note and mortgage executed to a third person; and (3) because no consideration was paid by Stivers for the note and mortgage, nor was any paid by the bank to him. They also insist, that if the bank was entitled to any judgment, no interest should have been allowed or recovered upon the note in suit, and that the usurious interest reserved upon the old notes, and incorporated into the note in suit, should have been excluded.

We have already held, in the case of the *First National Bank of Columbus v. Garlinghouse*, decided at the present term (*ante*, p. 811) that the reservation of illegal interest by a National bank, organized or acting under the act of 1864, does not render the note or bill discounted void *in toto*. These old notes were, therefore, at the time of the making and execution of the note and mortgage

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in suit, valid and subsisting securities, and their surrender was a sufficient consideration to support the note and mortgage in suit. And there is clearly nothing in the objection that the note and mortgage were made to Stivers, and without consideration moving from him, and transferred by him to the bank without any consideration from the bank to him. This was a mere form of executing the new notes and mortgages to the bank. Stivers took them, of course, as mere agent or trustee for the bank. The whole thing was done by the mutual agreement of all parties, and that agreement and its execution on the part of the bank, and by Stivers, was the real consideration for the notes and mortgage executed by the Shinkles.

We are equally clear in the opinion that the bank had power, by its charter, to take notes and mortgages in this way and form, for the purpose of securing its claims. The power to adopt reasonable and necessary measures for the collection and security of debts is necessarily incident to the power of banking.

As we construe section 8 of the act of Congress of 1864, it expressly gives all such necessary incidental powers, without limitation as to the particular modes in which they are to be exercised. The words, "by discounting promissory notes, drafts, bills of exchange," etc., contained in that section, are not to be read as limiting the modes of exercising the incidental powers granted, but as limiting and defining the kind of banking which is authorized by the act. In other words, the association is authorized by section 8 to carry on "banking by discounting and negotiating promissory notes, drafts, bills of exchange," etc., and to exercise "all such incidental powers as shall be necessary" for that purpose.

But did the court err in allowing the bank to recover interest upon the new note, and to recover the illegal interest reserved upon the old notes, or, rather, the *pro rata* part of such illegal interest incorporated in the new notes? We think not. We regard the transaction of settlement between these parties as an absolute payment of the old notes, and in no sense a renewal or continuance of the indebtedness which they were given to secure. In legal effect the transaction was equivalent to an actual payment of the old debts in money, and the borrowing anew by each party of the amount for which he so executed his new note and mortgage. Viewed in this light, it is undeniable that the new note in suit, not being in itself usurious, would bear interest. It would follow

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also that the Shinkles, under the provisions of section 30 of said act, would have the right to recover back from the bank double the amount of the usurious interest so paid. But this right to recover double the amount of interest is limited by the act to two years from the time the interest was paid, and unless it is exercised within that period it is gone. In the present case the period of two years had elapsed long before the commencement of the action. The right to recover the interest being barred, the right to offset the amount against any claim of the bank is also barred. It is unnecessary, therefore, to inquire whether a *pro rata*, or any other part of the usurious interest so paid upon the old debts, could, in case the right of recovery had not been so barred, be offset against the claim of the bank in the present case. It is enough to say, if the right ever existed, it has been extinguished by lapse of time.

*Motion overruled.*

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ALLEN v. THE FIRST NATIONAL BANK OF XENIA.

(23 Ohio State, 97.)

*Loans in excess of one-tenth of capital — Usury — Mortgage to bank.*

Where a National bank, organized from a State bank under the provisions of the National Currency Act, at the time of its organization took from such State bank, among the discounted notes, one for a larger amount than the National bank was authorized to loan to a single borrower, such note is not, nor is any note subsequently given in renewal thereof, to be regarded, within the meaning of section 29 of said act, as given for money borrowed of the National bank.

In an action brought by a National bank on a note given by way of renewal for a balance due on a previous loan, which had been reduced by renewals and payments below the maximum sum which it was authorized to loan to a single borrower, it is no defense that the original loan was for a larger sum than the bank was, by its charter, authorized to make.

National banks are authorized to take mortgages on real estate in good faith to secure debts previously contracted. A National bank extended the time of payment of indebtedness at a usurious rate of interest, and took therefor notes and a mortgage made by the debtor to a third person, the notes being indorsed by the latter. *Held*, that the usury only avoided the interest, and

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that to the extent the debt was valid the mortgage was a *bona fide* security and that the bank, by becoming the owner of the notes, acquired the equity in the mortgage.

**E**RROR to the District Court of Green county.

The original suit was brought by the defendant in error against the plaintiff in error, Allen, upon four promissory notes and upon a mortgage executed to secure their payment. The notes were dated July 13, 1866, each being for \$5,000, and payable one year after date to the order of C. R. Merrick, and were signed by Allen, as sole maker, and indorsed by Merrick. The mortgage was also executed by Allen to Merrick, and was duly recorded.

These notes and mortgage were delivered by Allen to the bank to pay the balance due on two other promissory notes then held by the bank against him. In addition to the amount of such indebtedness, there was included in said notes interest at the rate of nine per cent per annum from their date to maturity.

The two notes held by the bank, in satisfaction of which said four notes were given, had been, at the time of giving said last-named notes, some time overdue, and were as follows : One dated December 16, 1865, for \$16,000, payable four months after date to the order of the bank, and signed by said Allen and by Merrick, McClure & Co., and Henry Neville, as makers. The other dated January 30, 1866, for \$10,000, payable four months after date to the order of said bank, and signed by Henry Neville, said Allen, and G. Snyder as makers.

The note of \$16,000 was for the balance of a loan of \$26,000, which had been made to Allen by the Xenia Branch of the State Bank of Ohio before that bank had been organized into the First National Bank of Xenia, the present defendant in error, under and by virtue of section 44 of the act of Congress known as the National Currency Act, approved June 3, 1864, and by the transfer of the assets of the said Xenia Branch of the State Bank of Ohio to the defendant in error, became the property of the latter. The original loan had been reduced by payments, and the time extended by renewals subsequent to the transfer.

The note of \$10,000 was given for the balance due on two loans originally made by the defendant in error, in 1864, to Merrick, McClure & Co., to secure which to the bank, Allen was one of their sureties. By an arrangement between Allen and Merrick,

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McClure & Co., Allen subsequently assumed to pay \$14,000 of their indebtedness to the bank. To carry out his arrangement with Merrick, McClure & Co., Allen gave to the bank his note, on which Merrick, McClure & Co. were sureties. This note was from time to time renewed and reduced by payments, until finally the note above named of \$10,000 was given.

The paid-up capital of the defendant in error at no time exceeded \$120,000.

The balance due from Allen to the defendant in error, on the 13th of July, 1866, the date of the four notes sued on, was \$18,-351.77, for which judgment was rendered, and on default of payment the mortgaged premises were ordered to be sold.

The District Court on error affirmed this judgment. The present petition in error is prosecuted in this court to obtain the reversal of these judgments.

*Goode & Bowman*, for plaintiff in error.

*B. Nesbitt*, for defendant in error.

WHITE, C. J. One of the assignments in error in this case has already been decided, at the present term, adversely to the plaintiff in error. *The First National Bank of Columbus v. Garlinghouse et al.*, 22 O. S. 493.

In considering that case, we had before us the argument in this case of the counsel of the present plaintiff in error on the question then decided ; and it is sufficient now to say, that we are satisfied with that decision.

2. Another ground of error assigned is, that the notes sued on were taken by the defendant in error in violation of section 30 of the National Currency Act of June 3, 1864. That section provides as follows :

“That the total liabilities to any association of any person, or of any company, corporation, or firm, for money borrowed, including in the liabilities of a company or firm the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in: *Provided*, that the *bona fide* bills of exchange drawn against actually existing values, and the discount of commercial or business paper actually owned by the person or persons, corporation or firm negotiating the same, shall not be considered as money borrowed.”

We are not called on by the facts of this case to determine what

would be the rights of the bank on a note or other evidence of indebtedness given for money borrowed of it in excess of the amount allowed by this section ; for we do not regard the notes sued on in this case as coming within the operation of the section. The consideration of the four notes in controversy was the two notes previously held by the bank against Allen and his sureties. If these notes were valid, there could be no objection to the bank, if it saw proper, extending the time of payment for the convenience of Allen, the principal debtor, or to its taking other security in lieu of what it then held, to insure final payment.

That the two previous notes were not affected by the section of the statute in question, to us seems clear.

The balance due on the note of \$16,000 was for money borrowed by Allen of the Xenia Branch of the State Bank of Ohio before its conversion into a National bank. This indebtedness passed to and became the property of the defendant in error on its organization. The indebtedness, it is true, had been continued by renewals, and reduced by payments, from time to time. But the consideration of the note was at no time money borrowed of the defendant in error.

The consideration of the note of \$10,000 was for money originally borrowed of the bank by Merrick, McClure & Co. Of this indebtedness, Allen assumed to pay \$14,000, and gave his note to the bank therefor. This amount was for more than one-tenth of the capital stock of the bank paid in. Allen's note to the bank was from time to time renewed and reduced by payments, until this note of \$10,000 was given.

Assuming, for the purposes of this case (though not conceding the correctness of the assumption), that Allen's note for \$14,000 is to be regarded as given for money borrowed by him of the bank, and that the note for this amount would have been invalid ; yet, if such were the case, it would not affect the validity of the note now under consideration. No part of the consideration was illegal in the sense of the maxim *ex turpi causa, non oritur actio*. If invalid at all, it would be so simply from want of corporate capacity on the part of the bank to make a contract in derogation of the authority conferred by its charter, and not because of any illegal element entering into the consideration of the note. *First National Bank of Columbus v. Garlinghouse*, 22 O. S. 502; *Bissell v. The Michigan Southern and Northern Indiana R. R. Co.*, 22 N. Y. 259; *Parish v. Wheeler*, id. 494.

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Regarding Allen as having borrowed a larger sum of money from the bank than it was authorized to loan to him, its repayment was neither *contra bonos mores*, nor forbidden by law. It was just and right for him to repay it. And having, by voluntary payments, reduced his apparent indebtedness below the amount which the bank was authorized to loan to a single borrower, the fact that it may have before taken his obligation for a loan in excess of its authority can constitute no ground for his discharge from an obligation given to the bank for the balance, and which it was clearly within the corporate capacity of the bank to take.

3. The remaining ground of error is the alleged invalidity of the mortgage.

By section 28 of the National Currency Act, the defendant in error is authorized to purchase and hold such real estate as may be mortgaged to it in good faith, by way of security for debts previously contracted.

We think the mortgage in this case comes within this provision of the statute. It was given to secure a debt previously contracted. The debt was valid to the extent of the principal sum included in the notes. The usury operated no further than to defeat the interest; and to the extent that there was a valid indebtedness, the mortgage was a *bona fide* security. The fact that time was given for payment can make no difference.

Nor do we think the objection is well taken that the mortgage was made to Merrick, and not assigned by him to the bank. The notes and mortgage were both made to Merrick, and the circumstances show this to have been done with his consent. The mortgage was a mere security for the payment of the notes; and both notes and mortgage were delivered to the bank in pursuance of an arrangement made between it and Allen for extending time on his indebtedness, and for giving up the securities the bank then held. By the indorsement and delivery of the notes, the bank acquired the equity in the mortgage.

*Judgment affirmed.*



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Higley v. The First National Bank of Beverly.

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## HIGLEY V. THE FIRST NATIONAL BANK OF BEVERLY.

(26 Ohio State, 75.)

*National bank—Usury—Limitation of right to recoup or counter-claim illegal interest.*

The knowingly taking or receiving by a National bank of a rate of interest greater than is allowed by law upon a loan of money does not entitle the person paying the same to have it applied as a payment of so much of the principal, in an action brought to recover the principal debt more than two years after such payment was made. The rights and liabilities of the parties in such case are prescribed in the National Bank Act, and cannot be controlled by State legislation.\*

MOTION for leave to file a petition in error to the District Court of Washington county.

This action was brought in the Washington County Common Pleas by the First National Bank of Beverly, Ohio (a corporation organized under the act of Congress passed June 3, 1864), against B. S. Higley and others, on two promissory notes, each dated June 18, 1874 (one for \$3,000, the other for \$102.50), and both payable at said bank, to the order of its cashier, ninety days after date. The petition demanded judgment for \$3,102.50, with interest thereon from September 19, 1874.

The answer was in two counts, both of which set out that the notes sued on were made in renewal of a series of other notes given for a loan of \$3,000 from said bank, July 5, 1871. The first count also alleges the payment of usurious interest on said loan, which was knowingly taken and received by said bank, as follows: July 5, 1871, \$77.50; October 6, 1871, \$77.50; January 6, 1872, \$77.50; April 8, 1872, \$77.50; July 10, 1872, \$77.50; total \$387.50.

The second count also sets out the payment of usurious interest on said loan, knowingly taken and received by said bank, in *addition* to the sums mentioned in the first count, as follows: October 11, 1872, \$77.50; January 12, 1873, \$77.50; April 12, 1873, \$77.50;

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\* See *Farmers' National Bank v. Dearing*, ante, p. 117; *National Bank v. Davis*, ante, p. 350; *Duncan v. First National Bank*, ante, p. 360; *Wiley v. Starbuck*, ante, p. 436; *Shinkle v. First National Bank*, ante, p. 824.

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July 14, 1873, \$77.50; October 15, 1873, \$77.50; January 16, 1874, \$40; April 1, 1874, \$60.50; June 18, 1874, \$102.50; total, \$592.50.

In the Common Pleas, the bank interposed a general demurrer to the first count of the answer, which was sustained. To the second count the bank replied, alleging that the payment of \$77.50, October 11, 1872, was made "more than two years" before the filing of the answer, which was October 24, 1874. There was a general demurrer to this reply, which was overruled. Thereupon judgment was entered against the defendants, in favor of the bank, for the whole amount claimed in the petition (except interest), less \$1,030, a penalty in twice the amount of the usurious interest paid *within* two years before filing the answer; to which judgment, as well as to the action of the court upon the two demurrers, the defendants below excepted; and afterward, at the April term thereof, 1875, prosecuted their petition in error in the District Court, which resulted in an affirmance of the judgment below.

This action is prosecuted to reverse the judgment rendered in the District Court, and also the original judgment of the Common Pleas.

*Ewart & Sibley, and Higley, for the motion.*

*S. B. Robinson, contra.*

McILVAINE, C. J. The main question in this case is thus stated by counsel for plaintiff in error: "Does the knowingly taking and receiving a rate of interest greater than is lawful, by a National bank, on a loan made, or note discounted by it in this State, *entitle the party paying the illegal interest to have it applied as a payment of so much of the principal debt, in an action brought more than two years after the payment was made, to recover the principal sum?*"

This question, we think, must be answered in the negative.

By section 8 of the National Bank Act, there is conferred upon National banks general powers necessary to carry on the business of banking, "by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt," etc. By section 30, the rate of interest which such banks may lawfully take, receive, reserve, and charge is limited; and it is also therein declared that "the knowingly taking, receiving, reserving, or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeit-

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ure of the *entire interest* which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon. And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back, in any action of debt, twice the amount of interest thus paid from the association taking or receiving the same; provided that such action is commenced within two years from the time the usurious transaction occurred." Laws 1st Sess. 38th Cong. 114, § 30.

Without stopping to inquire how a bank may be affected in its relations to the government by reason of usurious transactions, it is quite certain that a customer who participates in the offense by paying or agreeing to pay a usurious rate of interest to such bank, is entitled to no relief or remedy except as provided in this section.

By the first provision in that part of the section above quoted, if the contract or promise to pay usurious interest be unexecuted, it cannot be enforced; and in such case the debtor is released from the payment, not only of the interest in excess of the lawful rate, but "the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon," must be held and adjudged to be forfeited. By the latter provision, if usurious interest "has been paid," twice the amount of interest paid may be recovered back from the association "taking or receiving" it, provided the action therefor be commenced within two years from the time the usurious transaction occurred. And by construing the whole section together we are inclined to believe that in case usurious interest has been "reserved" at the time of the loan or discount, there is left to the bank a *locus penitentiae*. In such case the bank may, upon receiving payment of the debt, discharge itself from all liability to the debtor by giving credit for the amount of interest reserved; otherwise the debtor may insist upon a reduction of his indebtedness to the amount actually loaned or advanced, or he may pay the whole claim, and afterward, within two years, recover back twice the amount of interest paid.

On this construction of section 30, it is clear that defendants below had no right, by virtue of the National Bank Act, to recoup from plaintiff's claim any sum whatever on account of usurious interest paid to the bank more than two years next preceding the time of filing their answer in the action below.

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Whether the rebatement made from the plaintiff's claim of twice the amount of usurious interest paid thereon within two years next preceding was properly allowed is a question not now before us.

It is also contended that, under the statute law of this State, if not the entire interest, at least the excess above the rate allowed by law, paid by the defendants below, should have been held as payments made on account of the principal.

Conceding that National banks are in many respects subject to the laws of the States where situate, and especially to their remedial laws, it is a good answer to the above claim to say that, in relation to usury and the rights and liabilities of the parties participating in the offense, Congress has assumed to make provision, and the provision so made must be regarded as exclusive. In this respect the act of Congress prescribes the only rule, and over it the legislative power of the State has no control.

The point is also made that a person entitled to recover back twice the amount of usurious interest paid is entitled to interest thereon from the date of payment until the time of recovery. On this point also we differ with counsel. The amount thus recoverable is in the nature of a penalty, and the statute must be strictly construed. Interest on such claim, before judgment, not being expressly given by the statute, cannot be allowed.

*Motion overruled.*

WELCH, WHITE, REX and GILMORE, JJ., concurred.

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SMITH v. THE EXCHANGE BANK OF PITTSBURG.

(26 Ohio State, 141.)

*Purchase of notes by National banks — Usury — Who entitled to forfeiture of interest.*

In the business of banking, the purchasing and discounting of paper is only a mode of loaning money; and a National bank is authorized thus to acquire notes and bills which are perfect and available in the hands of the borrower, as well as his own paper made directly to the bank.\*

Where a note or bill is an existing security in the hands of the holder, the

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\*See *First National Bank v. Pierson*, ante, p. 637, and note

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usury exacted by the bank in its acquisition is not available, by way of defense, to the antecedent parties. Their rights and liabilities are not affected by the usurious character of a transaction in which they did not participate.

The party with whom the bank had the usurious transaction is the party to whom, under the National Banking Act, the forfeiture of interest is to be adjudged; and who, in case the interest has been paid, is authorized to recover back twice the amount.

**M**OTION for leave to file a petition in error to reverse the judgment of the District Court of Franklin county.

On the 17th day of October, 1874, the defendant in error commenced an action in the Court of Common Pleas of Franklin county, against Benjamin E. Smith, William Dennison, James M. McKee, Francis Collins, D. T. Thompson, A. J. Ware and C. R. Griggs, upon a bill of exchange, of which the following is a copy, with the indorsements thereon:

“\$6,000.

COLUMBUS, OHIO, *March 5, 1874.*

Five months after date pay to the order of Harbaugh, Matthias & Owens, six thousand dollars, at St. Nicholas National Bank, New York city, value received, and charge to account of B. E. Smith. To Thompson, Griggs & Co. Columbus, Ohio. Accepted: Thompson, Griggs & Co.”

Indorsed: “Pay order of Exchange National Bank of Pittsburgh. Harbaugh, Matthias & Owens.”

The petition in the action alleges, among other facts, that the bill was accepted in writing by said Thompson, Griggs & Co., on the 4th day of April, 1874, and was on that day indorsed and delivered for value to the defendant in error; that said Smith is liable on the bill as drawer, and all the defendants are liable thereon as acceptors; that on the day the bill became due no part thereof was paid, although then presented to said Thompson, Griggs & Co., at said St. Nicholas National Bank, in New York, for payment, and protested — of all which said Smith had then due notice; that said St. Nicholas National Bank is situate in the State of New York, and the legal rate of interest therein is seven per centum per annum; that there is due from the defendants to the plaintiff the sum of \$6,000, with interest thereon, at the rate of seven per centum per annum, from August 8, 1874, and \$2.49 cost of protest; and for all which the plaintiff prayed judgment.

On the 18th of November, 1874, two of the defendants — namely, Smith and Dennison — filed their answer. It sets up three grounds of defense:

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1. That the plaintiff is not entitled to recover interest upon the amount of said bill *at the rate of seven per cent per annum* from August 8, 1874, on which day the bill became payable.

2. That on the 4th of April, 1874, the plaintiff in the action *purchased* said bill of said Harbaugh, Matthias & Owens, the payees thereof; and that, by the provisions of the act of Congress to provide a National currency, the plaintiff had no authority to purchase said bill, and therefore has no legal right to maintain the action.

3. That the plaintiff has its place of business in the city of Pittsburg, Pennsylvania; that by the law of that State the rate of interest is six per cent per annum, and by said act of Congress plaintiff is only entitled to charge interest at that rate upon its loans, discounts, etc.; but that in the purchase of said bill the plaintiff, as the defendants are informed and believe, and from such belief aver, charged and received interest at the rate of nine per cent per annum, and that such act was illegal, usurious and void, and the plaintiff has no legal right to maintain said action on said bill.

On the 1st of December, 1874, the plaintiff filed a demurrer to each ground of defense.

Afterward—to wit, December 21, 1874—the plaintiff moved the court to hear the issues of law raised by said demurrers, out of the order in which the cause had been placed on the trial docket. Smith and Dennison resisted the motion, and filed a paper styled an answer to the motion, in which they claimed that their legal counsel had not “prepared properly for the hearing and argument of said issues of law” at the term of the court then being holden, and asserted that the court could not legally order the cause to be heard on the demurrers until it was regularly reached on the docket.

The motion was sustained, and the cause heard upon said demurrers, and taken under advisement by the court.

At the January term, 1875, the demurrers were sustained. Thereupon, said Smith not asking leave to amend his answer to the petition, nor to plead further, the plaintiff submitted the cause to the court; whereupon the court found that said Smith, as drawer of said bill of exchange, owed to the plaintiff the sum of \$6,221.82, as alleged by the plaintiff, and that the action was one in which a several judgment could properly be rendered against said Smith as drawer of said bill, leaving the action to proceed against the parties defendant charged in the petition as acceptors; and a judg-

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ment was accordingly rendered against said Smith for said sum, and an order entered that the action proceed against the defendants charged in said petition as acceptors of said bill.

Smith afterward filed a petition in error in the District Court to reverse said judgment. Before the cause came on to be heard, the plaintiff below, by leave of the court, remitted from said judgment the sum of \$32, as of the date of rendition thereof, being the amount of interest included therein over and above the rate of six per cent per annum, computed on the amount of said bill of exchange after its maturity, and leaving due on said judgment, at the rendition thereof, the sum of \$6,189.82. And thereupon the cause was heard, and the court adjudged that said judgment, deducting said sum of \$32 remitted as aforesaid, be affirmed, but at the costs of the defendant in error.

The entry of the *remittitur* of all interest over and above six per centum per annum, from the maturity of the bill to the rendition of the judgment, put an end to the question made by the demurrer to the first defense.

Leave is now asked to file a petition in error in this court, to reverse the judgment of affirmance of the District Court, and also the judgment of the Court of Common Pleas.

*L. English and J. W. Baldwin*, for the motion.

*Harrison & Olds, contra.*

WHITE, J. We find no error in this case.

We will briefly consider the several questions raised in argument. [The court here considered a question of practice.]

The objections to the action of the court in sustaining the demurrers are in substance :

1. That the bank, the plaintiff below, had not capacity to acquire title to the bill sued on.

2. That if it had such capacity, the usurious transaction by which it acquired the bill from the holders, Harbaugh, Matthias & Owens, disables it from collecting any interest from the antecedent parties.

As to the first of these objections, the answer in the first defense sets up that the bank purchased the bill of the holders, the payees.\* It does not state that the purchase was made at a usurious rate of discount ; but it avers that under the act of Congress to provide a

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National currency, under which the act was incorporated, it had no authority to *purchase* the bill.

It seems to be the idea of counsel making the objection, that negotiable paper, perfect and available in the hands of the holder, is not the subject of purchase by a National bank at any rate of discount. This view, we think, entirely erroneous. We see nothing in the act of Congress nor in reason why a borrower may not obtain the discount by a bank of the existing notes and bills of others of which he is a holder, as well as of his own paper, made directly to the bank.

It is true that, as between natural persons, the purchase of such paper, when made in good faith, and not as a disguise for a loan, is not subject to the usury laws ; but it is otherwise as to a bank. In the business of banking, the purchasing and discounting of paper is only "a mode of loaning money." *Niagara County Bank v. Baker et al.*, 15 Ohio St. 69; *Fleckner v. The Bank of the United States*, 8 Wheat. 333.

As to the second objection—namely, that the usury exacted by the bank from Harbaugh, Matthias & Owens, in the acquisition of the paper, disables it from recovering any interest from the antecedent parties.

The general rule is, that where a bill or note is valid, as between the drawer or maker and the payee, so that the latter can maintain an action upon it against the former, it is valid in the hands of an indorsee, who has discounted it at a usurious rate of interest, and he may recover the full amount of the bill or note against the maker or acceptor. *Munn v. Commission Company*, 15 Johns. 44.

The question is, whether this principle has been modified by the act of Congress now in question.

Section 8 of the act defines the powers of The National banks. It declares, among other things, that they shall be authorized "to carry on the business of banking, by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt."

Section 30 prescribes limitations upon these powers, and imposes penalties upon the banks for the transgression of such limitations.

The section declares "that every association may take, receive, reserve and charge on any loan or discount made, or upon any note,



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bill of exchange, or other evidence of debt, interest at the rate allowed by the State or Territory where the bank is located, and no more," etc. It also declares that "the knowingly taking, receiving, or reserving, or charging a rate greater than aforesaid, shall be held and adjudged a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon." The section also contains a provision, that in case a greater rate of interest has been paid, the person or persons paying the same may recover back twice the amount of the interest thus paid.

Now, manifestly, this section has reference to the agreement or transaction between the bank and its customer. It is the party with whom the bank had the usurious transaction to whom the forfeiture of the entire interest is to be adjudged, and who, in case it has been paid, is authorized to recover back twice the amount. The rights and liabilities of antecedent parties cannot be affected by the usurious character of a transaction in which they did not participate.

In the present case, if the indorsers to the bank, Harbaugh, Matthias & Owens, should take up the bill, under their indorsement, their right to recover the full amount from the drawer and the acceptors would be unaffected by the fact as to whether they had or had not asserted against the bank their rights growing out of the usurious transactions.

The remaining objection is to the action of the court in rendering a separate judgment against the plaintiff in error, and continuing the case as to the other defendants.

The liability of the drawer of a bill of exchange is a several liability, and at common law was required to be enforced by a separate action. The Code, by allowing all the parties to the bill to be joined in one action, does not require a joint judgment against all. Section 371 expressly provides that, "in an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment may be proper." Where a separate action might have been maintained against a party, a separate judgment under this provision of the Code is certainly proper.

What effect the fact that the drawer is also one of the firm who

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accepted the bill may have on the right of the plaintiff to take a future judgment against the acceptors, we are not called on now to consider. *Leave refused.*

MCLLVAIN, C. J., WELCH, REX and GILMORE, JJ., concurred.

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THE VENANGO NATIONAL BANK V. TAYLOR.

(56 Pennsylvania State, 14.)

*Deposits in National bank — Offset of, against debt due bank.*

A National bank having become insolvent, a depositor therein assigned his deposit to a debtor of the bank. *Held*, that the latter could not offset such deposit against his debt in an action thereon.\*

THE following facts appeared in a case stated, agreed upon by the parties:

On the 14th of April, 1865, Taylor gave to the bank his bond for \$65,000, with warrant of attorney to confess judgment, and at the same time deposited with the bank \$31,000 of United States bonds as collateral security for the bond. The bank sold the bonds in June, 1865, with the understanding that their proceeds were to be credited on Taylor's bond. These proceeds, with interest, amounted to \$32,000, but the credit was not given.

One John Rynd had to his credit on deposit in the bank, on the 27th of March, 1866, \$43,743.25. On that day the bank closed its doors and suspended payment, being then and ever since insolvent; and on the same day suit was brought by Rynd to the use of Taylor to recover his deposit. The writ was served the same day. On the 28th of March, Rynd assigned his deposit to Taylor, and afterward, on the same day, the bank entered judgment against Taylor on his above-mentioned bond.

On the 23d of April, judgment was entered for the plaintiff in the suit Rynd to the use of Taylor against the bank, for want of an affidavit of defense; the judgment, on the 12th of May, was liquidated at \$44,071.23.

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\*See *Platt v. Bentley*, *ante*, p. 758.

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On the 1st of May, the judgment of the bank against Taylor was opened, and Taylor let into a defense on the above-stated facts. On the 8th of May a receiver was appointed, who has the bank in charge.

“ On these facts the defendant claims a credit of, first, of the \$32,000, and next by way of set-off of so much of the Rynd judgment as will satisfy the residue of the bank judgment, and if the court is of the opinion that he is entitled to it, judgment to be entered in his favor; or, if he is entitled to a credit for the \$32,000, but not to a set-off of the Rynd judgment, then judgment to be entered for the bank for \$35,024; and if he is not entitled to a credit of either, judgment to be entered for the plaintiff for \$65,000, with interest from April 14th, 1865.”

The court (GORDON, A. J.) entered judgment generally for the defendant, and this is the error assigned in the Supreme Court.

*D. Derrickson*, for plaintiff.

*Taylor & Mackey* and *A. H. M. Miller*, for defendant.

STRONG, J. The only question in this case is, whether the defendant is entitled to use, as a defense to his bond, the deposit assigned to him by John Rynd. The bank became insolvent on the 27th day of March, 1866. On that day it closed its doors and suspended payment, and on the 8th of May next following a receiver was appointed by the Comptroller of the Currency in accordance with the provisions of the act of Congress of June 3d, 1864. The receiver still has the assets of the bank in charge. On the 28th of March, 1866, Rynd had to his credit for deposits made in the bank the sum of \$43,743.25, and on that day he assigned the deposit to Taylor, the defendant. It is this deposit, thus assigned, for which judgment was subsequently recovered, that the defendant claims a right to set off against a claim of the bank against him on his bond for \$65,000, given April 14th, 1865.

It is plain that, if he can use his equitable title to the deposit made by Rynd as a defense against the legal claim of the bank, a preference of one creditor of the bank over others is wrought out and secured after the act of insolvency.

But this is the very thing which, in our opinion, the act of Congress aimed to prevent. The bank is a creature of the act,

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dependent upon it for all its powers, and controlled by all the restrictions which the act imposes. And creditors dealing with the bank can obtain only such rights as it is authorized to give.

In seeking for the meaning of the act of Congress we are to note its spirit as well as its letter, and its general intent is not difficult to discover.

It provides a system for closing the affairs of an insolvent bank, the clear design of which is to place all creditors, except the government and note-holders, on an equal footing. Its purpose is to disallow preference of one creditor over another, and it denies the power to make such preference at any time after an act of insolvency. The 50th section provides that after such an act a receiver may be appointed who shall take possession of the assets of every description, collect all debts, sell all real and personal property, and pay over all money so made into the treasury of the United States, subject to the order of the Comptroller of the Currency.

The section then provides for a ratable division of the money among the creditors after paying the government for the redemption of the circulating notes outstanding. The 52d section enacts "that all transfers of the notes, bonds, bills of exchange and other evidence of debt owing to any association '(bank),' or of deposit to its credit; all assignments of mortgages, securities on real estate, or of judgments or decrees in its favor; all deposits of money, bullion or other valuable things for its use, or for the use of any of its shareholders or creditors; and all payments of money to either, made after the commission of an act of insolvency, or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by this act (that is, ratably), or with the view to the preference of one creditor to another, except in payment of its circulating notes, shall be utterly null and void."

This section is too plain to be misunderstood; read in connection with the 50th section it admits of no doubt that the purpose of Congress was to secure all the assets of the bank existing at the time of its act of insolvency for ratable distribution.

We cannot assent to the argument that it was intended for no more than to avoid all acts of the bank itself, all *voluntary* transfers by it of its notes, bonds, deposits, etc., with a view to giving preferences. Its language is general, as applicable to legal as to voluntary transfers.

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But if the deposit made by John Rynd can be set off against the bond debt due by Taylor to the bank, what is it but a transfer of the bond debt to the satisfaction of a creditor, thus giving him a preference? It is not contended that the bank was not prohibited from doing this, but it is insisted the transfer may be accomplished by an adversary proceeding at the suit of Rynd for the use of Taylor. It is not denied that Rynd, had he made no assignment of his claim, could not have obtained payment of the debt due him by calling upon the bank after the 27th day of March, 1866, when its doors were closed, and when it suspended payments. The bank, it is conceded, was not at liberty to transfer to him either their claim against Taylor or any of their assets, or to pay him any money; and if so, can the thing be secured by a hostile proceeding? Will the law compel a payment or a transfer which the law prohibits a debtor from making? A bank after an act of insolvency has no more right to pay a judgment or an execution than it has to pay a debt before it has passed into judgment. But if Rynd could in no way have obtained payment of the deposit due him after the 27th day of March, 1866, except through the Comptroller of the Currency, how could he give to Taylor, by his assignment of the deposit, any right which he did not himself possess? In this case the assignment was only an equitable one. It did not pass the legal ownership. Taylor had but an equity, and strictly must have gone into equity to obtain any benefit from the transfer. Yet had a chancellor been called upon to enforce the equity, it is plain he would not have enforced it at the expense of other creditors who had a right to a ratable proportion of the assets of the insolvent banking association. Much less would he have compelled the bank to do what the act of Congress had denied it power to do. It may be conceded, as was insisted in the argument, that there is nothing in the act of Congress which declares that the assets of a bank vest in the receiver immediately from and after an act of insolvency, or that the appointment of the receiver relates back to such act. Indeed at no time does the property in those assets vest in the receiver. The difficulty of the defendant does not lie here, but it is found in the prohibition of any transfer or disposition of the assets until after a receiver has been appointed, coupled with the manifest purpose for which the prohibition was made. The bank's property is placed by the act under the immediate potential control of the government. It is noticeable that the

first object sought to be secured was the payment of the circulating notes. The money obtained by the receiver, after being paid into the treasury, is to be applied first to satisfying the government for the redemption of such notes, and next to payment of creditors of the bank, among whom, of course, are included depositors ratably. But this primary object would be defeated if depositors can transfer their deposits to the debtor of the bank, and enable them by set-off to relinquish the debts. By such process the depositors would secure payment of their claims in preference to the note-holders or the government, and ratable distribution among other creditors than the note-holders be frustrated. It need hardly be said that no construction can be given to the act of Congress so directly at war with its spirit.

The defendant has called our attention to *Miller v. Black*, 1 Barr. 420. There an attachment execution had been laid upon a debtor's property after he had made a voluntary application for the benefit of the Bankrupt Act of 1842, but before he was declared a bankrupt; and it was held that the lien of the attachment was preserved by the act, and that it was good against the assignee in bankruptcy.

The case has but a slight resemblance to the present. It is true, the act contained a provision that "all payments, securities, conveyances or transfers of property, or agreements made or given subsequently to the time when the act was to come into operation, *by any bankrupt* in contemplation of bankruptcy, and for the purpose of giving any creditor, indorser or surety, or other person, any preference or priority over the general creditors of such bankrupt, should be deemed utterly void and a fraud upon the act." This was aimed expressly against fraudulent acts of the bankrupt, alone. And the act also contained a provision preserving liens on real and personal property valid by the laws of the State, and not inconsistent with the provisions of its 2d and 5th sections. Moreover, it enacted that the property of the bankrupt should be divested and become vested in the assignee from the time of the decree in bankruptcy. The assignee was clothed with such rights as might have been exercised by the bankrupt "at the time of his bankruptcy declared." The ruling of the court appears to have rested upon the clause which preserved liens on the debtor's property. Besides it was a case of a voluntary petition. The petitioner might have withdrawn his application at any time before the decree, and the

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fact that he could have discontinued his proceeding was given as another reason why an execution against his property should be held valid.

It is by no means certain that had he been proceeded against by a creditor with a view to having him declared a bankrupt, the same ruling would have been made. However this may be, the provisions of the Bankrupt Act were so unlike those of the Banking Act that the decision of *Miller v. Black* gives us no assistance in the construction of the latter.

We hold, then, that there was error in allowing the deposit made by Rynd to be used as a set-off against the claim of the *Bank v. Taylor*. The defendant was entitled to a credit for the \$32,000, realized from the sale of the United States bonds, for there had been an understanding that the proceeds of such sale should be applied on the debt due by him, but he was entitled to no other credit.

The judgment is reversed, and judgment is entered for the plaintiff for the sum of \$35,024, according to the case stated.

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KELSEY V. NATIONAL BANK OF CRAWFORD.

(69 Pennsylvania State, 426.)

*Responsibility of National bank for liabilities of State bank.*

A State bank was robbed and a reward was offered by the cashier for the detection of the thieves. The bank afterward became a National bank, and suit was brought against it as such for the reward. *Held*, that the action was properly brought, as the National bank was responsible for all the liabilities of the State bank.

**A**CTION to recover a reward offered by the cashier of the Bank of Crawford county for the detection of the thieves who had robbed said bank. The plaintiff detected the thief. Afterward the bank became a National bank. There was evidence tending to show that the directors ratified the act of the cashier in offering the reward.

The plaintiff was nonsuited.

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*D. M. Farrelly & A. B. Richmond*, for plaintiff in error.

*P. C. & D. Derrickson*, for defendant in error.

WILLIAMS, J. [After deciding that whether or not the cashier had power *ex officio* to offer the reward, the acquiescence of the directors amounted to a ratification.] But it is contended that the action will not lie, because it was brought against the wrong corporation. It was the State bank that was robbed and offered the reward, and the National bank is the corporation sued. But under the provisions of the act of the 22d of August, 1864 (P. L. 977), "enabling the banks of this Commonwealth to become associations for the purpose of banking, under the laws of the United States," upon the surrender of its charter all the assets of the State bank were immediately, by act of law, without any conveyance or transfer, vested in the National bank, and all its liabilities and obligations were devolved upon it. Why, then, should not the remedy for the liabilities incurred by the former be by action against the latter? It was admitted on the argument that the National bank is bound to discharge and satisfy all the obligations and liabilities of the State bank, but it was insisted that under the proviso of the enabling act, continuing the State bank a body corporate for the term of three years after the surrender of its charter, for the purpose of prosecuting and defending suits by and against it, that suits to enforce the payment of its obligations and liabilities must be brought against the State, and not against the National bank. Undoubtedly an action will lie against the State bank for any of its liabilities, if brought within the time limited in the proviso; but it does not follow that it will not lie, if brought against the National bank. Why compel the plaintiff to bring an action against the State bank when it has no assets to meet and satisfy the demand? Why not avoid circuitry of action by bringing suit in the first instance against the corporation invested by act of law with all the assets, and made responsible for all the engagements of the State bank? Why bring two suits when one will suffice? We discover no provision in the act making it the duty of the plaintiff to proceed in the first instance against the State bank, and are of the opinion that the action is rightly brought against the National bank.

But it is objected that the declaration is defective in not setting



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out the facts, with the necessary averments, on which the liability of the corporation sued arises. And for this reason it is urged that the nonsuit was properly entered. It is admitted that the declaration is defective, but this objection was not made in the court below as one of the grounds for the nonsuit. If it had been, the plaintiff might have amended his declaration, and therefore we will allow him to amend *nunc pro tunc*, and treat the case as if the amendment had been made in the court below when the motion for the nonsuit was entered.

It follows from what we have said that the plaintiff is entitled to recover if the directors had notice of the offer, and did not promptly disavow it.

*Judgment reversed and a procedendo awarded.*

## BROWN v. THE SECOND NATIONAL BANK OF ERIE.

(72 Pennsylvania State, 209.)

*Usury — Forfeiture of interest — Actions for penalty — Limitation of.*

Under the 30th section of the National Banking Act, the remedy of the "forfeiture of the entire interest" for the exacting of unlawful interest can only be had by way of defense to an action on the note, or to recover the loan, but no action lies for it.

Where usury has been actually paid to and received by a bank, the only remedy is an action for the penalty of "twice the amount of interest thus paid."

The limitation of two years within which an action for the penalty must be brought commences to run from the actual payment of the usury \*

**A**CTION of assumpsit by the Second National Bank of Erie against the Executor of Brown, deceased, to recover the amount of three promissory notes made by one Thompson, payable to the order of said Brown, and by said Brown indorsed. The plaintiff discounted the notes for said Thompson. It appeared at the trial that Brown had an assumpsit with the bank, whereby the latter had discounted a number of notes for him at nine per cent

\* See *Overholt v. First National Bank*, *post*, explaining this case; see, also, *Lucas v. Government National Bank*, *post*.

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discount; and that the notes in suit were in renewal of other notes, and were discounted at the same rate. The amount of the notes in suit was \$22,000, and each was for sixty days.

The lawful rate of interest in Pennsylvania, where the bank was located, was six per cent.

The excess of legal interest retained by discount on the notes in suit was \$132. The legal questions involved in the case were thus stated in the charge of JOHNSON, P. J., viz.:

The United States Banking Law, under which the plaintiff bank was organized, forbids the taking of any more interest for the loan of money than is allowed by the State in which the particular bank is located. The plaintiff being located in Pennsylvania could, therefore, legally charge only six per cent per annum for money lent to its customers.

“If this prohibition of the act be violated by the bank a penalty is imposed. It is this:

“1. If the contract to take a greater interest than six per cent be executory the whole interest for the period of discount is forfeited, and the bank can only recover the principal from and after the maturity of the note or contract.

“2. If the usurious interest has actually been paid, the borrower may sue and recover twice the amount so paid, provided he sues for it within two years from the time of payment.

“In neither case does the statute declare the real debt or money borrowed forfeited, or deny the right of the bank to recover it. The act of Congress having prescribed the penalty for its violation in this respect, no other or different one can be imposed by the court, nor any other consequences declared than such as its framers have ordained.

“The proof shows, without denial or contradiction, that in 1864-5-6, V. M. Thompson, whose indorser the defendant's testator was, had a continuous line of discounts at the Second National Bank of Erie, and was charged nine per cent per annum, besides exchange. His notes and bills were all made payable at New York, where some of them were paid by him and other parties. Others were paid by renewals or new discounts at the defendant bank, and the usual exchange between this city and New York charged.

“From this state of undisputed facts the defendants deduce several inferences, and ask us to declare to you as the law:

“1. That the plaintiff having discounted a long series of notes

for V. M. Thompson, of which those in suit are the culmination, in violation of the express words and against the policy of its fundamental law, it cannot recover at all any part of its claim.

"2. That having charged and received unlawful interest on money, notes and bills preceding those in suit, it thereby forfeited and became liable to pay to V. M. Thompson double the amount of interest so paid, and that he has a right to defalk those amounts and have the same credited on the notes now in suit against his surety.

"That if he is not entitled to this credit he should, at least, have credit for the excess of interest or discount that he has paid from time to time as of the date of the notes on which this suit is brought.

"3. That he is entitled to an abatement of the interest on the notes in suit because they were discounted at a higher rate of interest than six per cent per annum.

"I believe these embrace substantially all the legal propositions presented by the defendant's counsel, pertinent to the issues raised by the facts in the case.

"From the first and second of these propositions we dissent.

"The act of Congress is the law of these National banks. It prescribes no such penalty as a forfeiture of the debt for a violation of its restriction as to the amount of interest to be charged. It does impose a penalty, and the only duty of the courts is to inflict it in the mode prescribed. For having taken usurious interest on previous loans the bank might have been sued within two years and double the amount so received recovered by the party injured. This was not done, and therefore all redress for that infraction of the law is gone. It is enough to say of that claim that it is outlawed—without deciding whether unsued for, it could have been claimed as a set-off even within the two years after the penalty had been incurred.

"We therefore charge you that the plaintiff is not barred from its recovery upon the notes in suit, by reason of its having taken usurious interest upon them, or on any previous notes or drafts discounted by it from the claim.

"Nor is the plaintiff entitled to set off or claim credit for double the amount of interest paid by Thompson on notes or bills previously discounted by the defendant for him.

"To the third proposition we agree, and say to you that for any

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excess of interest taken by the plaintiff in the discount of notes or drafts previous to those in suit for Thompson in the regular course of business, he is entitled to a credit, and the defendants may claim it as a set-off in this case. Such amounts being received in violation of law cannot be retained, and neither time nor contract will sanctify them or legalize the defendant's possession as against the rightful owner. \*

"We also approve the fourth proposition, that the defendants are entitled to an abatement of all interest or discount charged for the loan of money upon the notes in suit prior to their maturity. This is conceded. This amount, Mr. Curry states, was \$355, which the defendants are entitled to have credited on the notes and deducted therefrom at their respective dates."

The verdict was for the plaintiff for \$23,849.50.

The defendants removed the record to the Supreme Court, by writ of error, and there assigned for error the rulings of the court in the charge.

*J. R. Thompson and C. B. Curtis* (with whom was *B. Grant*), for plaintiff in error.

*J. C. Marshall and J. H. Walker* (with whom was *F. F. Marshall*), for defendant in error.

SHARSWOOD, J. A close examination of the words of the act of Congress of June 3d, 1864, under which the defendants in error were organized and incorporated as a National bank, will show, we think, that it was intended to draw a distinction between the case of the reservation of a discount at an unlawful rate of interest and the actual consummation of the usury by the receipt of it by the payment of the note or loan when due. It is declared by the 30th section that "the knowingly receiving, reserving or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the note, bill or other evidence carries with it, or which was agreed to be paid thereon." This has evident reference to the enforcement of the contract by judicial process, in which case it is provided that it shall be held and adjudged that the bank shall forfeit the entire interest — that is, shall recover only the sum actually loaned or advanced without any interest at all. There is a marked difference in the language of the clause which follows and which makes provision for the case

where the usury had been consummated by the actual receipt by the bank of the usury. "And in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back in any action of debt twice the amount of interest thus paid from the association taking or receiving the same: Provided, that such action is commenced within two years from the time the usurious transaction occurred." Upon any other construction it would be difficult to make the different clauses of the section consistent. For if on payment simple interest is forfeited, why not also provide for its recovery back by action as well as for the penalty of double the amount? Nothing would have been easier than to have expressed the intention that the entire interest should be recovered back in all cases, but double the amount only by an action instituted within two years. The maxim well applies, *Expressio unius est exclusio alterius*. If there were no special limitations in the act, and it has no necessary connection with the other clauses, no consistent construction could be put upon the language of the section taken altogether, except by holding that no action can be maintained for the simple interest, neither before nor after it is paid; but as to that, the remedy is by defense to the action on the note or loan, in which case the entire interest "shall be held and adjudged" to be forfeited. There may be a good reason for this if it was the intention of Congress to give the bank a *locus pœnitentiæ* so far as the penalty of double the amount was concerned, and allow them to save it by not actually taking it upon the maturity and payment of the debt. This accords with the general current of the decisions upon the construction of the usury laws whenever the contract is not itself declared to be void by the statutes. It is actual payment on the foot of the usurious contract, either in part or in whole, which consummates the usury, and from which the limitation of the action for the penalty commences to run, but lawful interest may be recovered in an action for the principal. *Wycoff v. Longhead*, 2 Dall. 92; *Turner v. Calvert*, 12 S. & R. 46; *Musgrave v. Gibbs*, 1 Dall. 216; *Kirkpatrick v. Houston*, 4 W. & S. 115; *Lamb v. Lindsey*, id. 44; *Thomas v. Shoemaker*, 6 W. & S. 179; *Oyster v. Longnecker*, 4 Harris, 269; *Craig v. Pleiss*, 2 Casey, 271. These views dispose of the only assignments of error which we consider it necessary to discuss.

*Judgment affirmed.*

## FOWLER V. SCULLY.

(72 Pennsylvania State, 456.)

*National bank — Validity of mortgage to.*

F. gave to a National bank a mortgage to secure notes thereafter to be discounted for him. *Held*, that under the National Currency Act of June 3, 1864, the mortgage was void, and could not be enforced against the assignee of F. for benefit of creditors of F.\*

**S**CIRE FACIAS issued by John D. Scully in trust for the First National Bank of Pittsburg against Silas S. Fowler and William Vankirk, to enforce the payment of a mortgage given by Fowler to Scully in trust for the bank. Vankirk was the assignee of Fowler, for benefit of his creditors. The object of the mortgage is thus recited in the instrument: "Whereas, the said bank hath agreed to discount for said Fowler an amount in the aggregate not exceeding \$100,000, such negotiable business paper as he shall offer for that purpose, consisting chiefly of bills of exchange, or drafts drawn by him on his customers on account of work, etc., done, and orders filled by him for them from time to time in the course of his business; and, whereas, said Fowler wishes to avoid the necessity of procuring the additional indorsement to said paper by a third party." \* \* \* \* \*

The defense was by Vankirk to the effect that the mortgage was void under the act of Congress relative to banking companies, of June 3, 1864. The court ordered judgment for plaintiff. The defendant brought error to this court.

*G. Shiras, Jr., and Hopkins & Lazar, for plaintiff in error.*

*M. W. Acheson, for defendant in error.*

AGNEW, J. The First National Bank of Pittsburg asked the District Court to enforce by *scire facias* the payment of a mortgage for future advances. The defendant, the owner of the mortgaged land, asserts that the mortgage is forbidden by the act of Congress,

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\* See *Wood v. People's National Bank*, *post*, and note.

## Fowler v. Scully.

which confers upon the bank its charter and all its powers. The simple question is: Is the mortgage valid or void; and if void, will the law enforce it? In deciding this question, we must be guided by the Federal laws and Federal precedents, for the subject is one of Federal origin and Federal control. The plaintiff is a corporation created and governed by the act of Congress, approved the 3d of June, 1864, commonly called the National Bank Act. What is the Federal rule to be applied to such a corporation? In the *Bank of U. S. v. Dandridge*, 12 Wheat. 64, Justice STORY lays down this rule: "Whatever may be the implied powers of aggregate corporations by the common law, and the modes by which these powers are to be carried into operation, corporations created by statute must depend, both for their powers and the *mode of exercising them*, upon the construction of the statute itself." For this he cites the following language of Chief Justice MARSHALL, in *Head v. Prov. Ins. Co.*, 4 Cranch, 127: "Without ascribing to this body, which in its corporate capacity is the *mere creature of the act* to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may be correctly said to be *precisely what the incorporating act has made it*; to derive all its powers from that act and to be *capable* of exerting its faculties *only* in the *manner* the act authorizes." These propositions are repeated by himself in *Dartmouth College v. Woodward*, 4 Wheat. 636, and by TANNEY, C. J., in *Bank of Augusta v. Earle*, 13 Pet. 587, and *Penrise v. Chesapeake & Delaware Canal Co.*, 9 How. 184. In our own State, the same doctrine is recognized in the case of a National bank. Justice STRONG said: "The bank is a creature of the act, dependent on it for all its powers, and *controlled by all the restrictions* which the act imposes." *Venango National Bank v. Taylor*, 6 P. F. Smith, 14.

This being the settled rule of interpretation, the question is: "Does the act of Congress authorize or permit a National bank to take a mortgage of lands, to secure the payment of future loans and discounts?"

The banking powers of these associations are to be found in the 8th section, and are "to carry on the business of banking by *discounting* and *negotiating* promissory notes, drafts, bills of exchange and other evidences of debt; by buying and selling exchange, coin and bullion; by loaning money on *personal* security; by obtaining, issuing and circulating notes according to the provisions of the

act." In view of the rule of interpretation of such charters given to us by the Federal courts, and the maxim *expressio unius est exclusio alterius*, the argument might close with the terms of the power to loan money on *personal* security; for agreeably to this rule and maxim, no other security than personal can be taken for money lent. This is the law of the bank's capacity, and of its control. It accords also with the nature of banking as a business, which is precisely described in the language of the law itself; the *discounting* and *negotiating* of promissory notes, drafts, bills and other evidences of debt (meaning of course, debts *eiusdem generis*, such as checks, certificates of deposits, etc.), the buying and selling of bills of exchange, bullion, and lending of money on personal security. The reasons are manifest. The business of a bank is commercial, not that of dealing in real estate, brokerage, etc. It, therefore, does not buy and sell real estate, ground-rents, mortgages, stocks, produce, etc.

It deals in commercial paper, on the security afforded by the personal responsibility of drawers, indorsers and payers, and this because banks are created for the purpose of trade, which require ready access to loans of money, and discounts on business paper made in the course of trade. Experience also has shown, that whenever banks abandon the legitimate practice of loaning or discounting on the well-known standing of the parties to commercial paper; to lend money on the hypothecation of stocks, real estate, etc., alone in lieu of personal security, they enter an uncertain and unknown region of credit. The directors can well know or ascertain the standing of drawers and indorsers as men of capital or means in the community, but the moment they leave this plain field to enter the region of corporation stocks, real estate and liens, they take a leap in the dark, and must resort to outside agents, such as lawyers, brokers, etc. The internal affairs and condition of a corporation are known to few, while the security of a mortgage rests on both title and liens, requiring professional skill to explore them. The evident intent of Congress is, that National banks should be institutions of commerce, not dealers in real estate, stocks or produce. What power there may be to accept a hypothecation of stocks in addition, and to strengthen a loan, we do not say. We are discussing the power conferred to *make* or *create* loans.

Another obvious purpose of confining their loans of money to personal security, is to prevent these associations from splitting on



the rock which has ruined so many banks, to wit: That of lending too much of their capital to one person or firm. The 29th section provides: "That the total liabilities to any association, of any person, or of any company, corporation, or firm for money borrowed, including in the liabilities of a company or firm, the liabilities of the several members thereof, shall at no time exceed one-tenth part of the amount of the capital stock of such association actually paid in." Thus Congress has prohibited an undue aggregation of its capital in single hands even though each note or bill may be well secured by the names upon it. Then what must we say of large aggregations of capital in the hands of one man, without personal security on the faith of an estimated value of real estate and the risk of title and conflicting liens? In the present case we see an aggregate of loans to Fowler, the mortgagor, of \$76,303.59; the very mortgage reciting that it was taken to dispense with personal security, and to extend to the sum of \$100,000. How much the paid-in capital of this bank is, we do not know. That such a transaction is contrary to the first principles of correct banking and to the charter, is obvious.

The intention of Congress is manifested by other features of the act. The 35th section declares: "That no association shall make any loan or discounts on the security of the shares of its own capital stock, nor be the purchaser or holder of any such shares, unless such security or purchase shall be necessary to prevent *loss* upon any debt *previously contracted in good faith*, and stocks so purchased or acquired shall, within six months from the time of its purchase, be sold or disposed of at public or private sale, in default of which a receiver may be appointed to close up the business of the association according to the provisions of this act." What is this, but to repeat to the bank — you must lend money only on personal security. Then comes the 37th section, prohibiting the bank from hypothecating its circulating notes to procure money to pay on its capital, or to be used in its banking operations, or from using its notes so as in any form to increase its capital. These two sections, the 35th and 37th, when viewed together, teach another lesson, that these banks shall not live upon themselves, so that, when compelled to wind up, creditors and stockholders shall not then discover that their apparent assets are composed of their own decayed viscera, instead of outside personal security. In this way only can the public be made safe against mismanagement.

Here the argument might rest, that the lending of money on mortgage or real estate security is *ultra vires* and forbidden. But Congress has left nothing to implication, and in the 28th section has said in what cases these banks may hold real estate, and has forbidden all others. The 28th section reads thus: "That it shall be lawful for any such association to purchase, hold and convey real estate as follows:" Then follow four numbered cases.

"First. Such as shall be necessary for its immediate accommodation in the transaction of its business.

"Second. Such as shall be *mortgaged* to it in good faith by way of security for debt *previously contracted*.

"Third. Such as shall be conveyed to it in satisfaction of debts *previously contracted* in the course of its dealings.

"Fourth. Such as it shall purchase at sales under judgments, decrees, mortgages held by such association, or shall purchase to *secure debts due* to such associations."

Now comes the prohibition against any other mode, and the appointed time such as shall have been legally acquired, shall be held.

"Such association shall *not* purchase or hold real estate in any *other case* or for any *other purpose* than as *specified* in this section, nor shall it hold possession of any real estate under mortgage, or hold the title and possession of any real estate purchased to secure any debts due to it, for a longer period than five years."

Thus the section speaks to the bank in plain language, you shall not purchase or hold real estate (besides your banking-house) except in good faith to secure debts already contracted, and you shall not hold in mortmain, for a longer period than five years, that which you can legally take. This section is interpreted also by the 35th section, which forbids the bank from taking its own stock in security, except to prevent the loss of a debt *previously contracted in good faith*; and when stock shall be so taken it shall not be held longer than six months. The language of prohibition in the 28th section is quite clear. The bank "shall not purchase or hold real estate in *any other case* or for *any other purpose* than as specified in this section." The second specified case in this section is, "such as shall be mortgaged to it in good faith by way of security for debts *previously contracted*." The law, therefore, says plainly, you shall not hold a mortgage for future loans, for that is another case.

If any thing were wanting to make plain that which is clear, it is the amendment of the 2d clause in the 28th section, and the debate on it in the Senate. See Cong. Globe, April 26, 1864. The amendment of the committee proposed to strike out, "for loans made by such association in the usual course of its banking business or for money due thereto," and to insert "for debts previously contracted," so as to make the clause read, "such as shall be mortgaged to it in good faith by way of security for debts previously contracted." At the call of Senator McDougall, Senator Sherman explained the amendment of the committee to allow the banks to take a mortgage for a pre-existing debt; but not to loan money on real estate security. "Not to loan money on mortgage?" said Mr. McDougall. Mr. Sherman again replied, "They have no right to loan money upon mortgage; they must take personal security, but after a debt is contracted, they may, in order to secure the debt, take a mortgage upon real estate." The amendment was adopted, and the section now stands so.

It is argued, however, that a mortgage is not real estate, and therefore it cannot be said that the bank holds real estate when it holds a mortgage. The criticism is unsound, in forgetting that the law is its own interpreter. A mortgage is one of the four enumerated cases of which the law says the bank may hold real estate as follows. Then followed the second case. It is also one of the cases referred to when the law says, the bank shall not hold in any other case than is specified in this section. The criticism overlooks the fact also that the act as a Federal law is intended to embrace the various conditions of the law of mortgage as realty or personalty, in the several States. Even in Pennsylvania, where no Court of Chancery existed, though viewed only as a security for money, mortgages have been regarded as conveyances of real estate in form and subject to real estate remedies, as by ejectment, and by writ of waste.

The argument founded on the 52d section is unsound. The mortgages therein referred to are of course those which may be lawfully taken for pre-existing debts, which, when found among the assets of the bank, shall not be so assigned as to create preferences among creditors. The express prohibition of the 28th section cannot be repealed by this reference to mortgages in the 52d section, when so ready a meaning can be found for the latter.

It is a clear and incontrovertible position, therefore, that a

National bank cannot lend money on the security of a mortgage, and that its power to take and hold a mortgage is confined to the second case in the 28th section, for debts previously contracted.

It is argued that the mortgage before us is not a mortgage for future advances of money, because of the recital that the bank "hath agreed to discount for said Fowler an amount in the aggregate not exceeding \$100,000, such negotiable paper as he shall offer for that purpose." It is said this is a covenant or obligation on the part of the bank to loan that sum, and, therefore, the money to be lent is not a future loan. But this confounds distinctions and ignores facts. Treat the recital as a covenant to lend, still the loans and discounts to be made are future. The bank did not owe Fowler \$100,000, and if it did, it had a security without a mortgage. The mortgage before us is not to secure a debt from the bank to Fowler, but a debt from Fowler to the bank, not exceeding \$100,000, which is to consist of negotiable business paper discounted for him without the necessity of procuring the additional indorsement for said paper by a third party. If the bank is bound to make the discounts, the breach of the covenant would be followed by such damages only as Fowler could show. So much is drawn from the instrument itself. Then the fact is, as it appears in the schedule of discounts, that though the mortgage bears date the 21st October, 1869, acknowledged and recorded on the same day, the first discount claimed under it was on the 11th April, 1870, after which comes twenty-two others, down to September 26, 1870. These are Fowler's debts to the bank, and they are all future to the mortgage. It would be an unmitigated fraud upon the act of Congress if a bank could first covenant to lend the money, and then found upon its own covenant a mortgage to cover a line of future loans and discounts.

The distinction between a mortgage to cover future advances at the discretion of the mortgagee, and one to cover advances he is bound to make, recognized in *Ter Hoven v. Kerns*, 2 Barr. 99, and other cases, has no bearing on the present question. That distinction was taken to regulate the rights and equities of lien-creditors among themselves, but does not change the nature of the advance itself. The advance in either case is future, but the effect upon the lien is different, just as the creditor was bound or not bound to make the advance.

It is further argued that to prevent injustice, equity will regard

the mortgage as delivered anew, on each discount or advance. This will do *inter partes*, to prevent wrong; but such a fiction cannot confer a power upon a corporation, withheld from it by its charter. The error is in forgetting that this is a question of statute power and public policy, not of mere equity between the parties. Any want of corporate power might be supplied by this means, and the mere interests of parties be made to override the law.

Whether VanKirk, the voluntray assignee of Fowler, can set up the defense here, depends, not on his character as a volunteer, but on the question whether the law will aid the plaintiff's recovery. If it will not, it is clear that VanKirk, as the owner of the estate by assignment, and under bond to administer his trust according to law, may and ought to defend for the interests of the creditors. This brings us to the second question stated in the outset of this opinion. The mortgage being void, will the law enforce it? All the authorities, English, Federal and State, say no. Mr. Powell, in his work on Contracts, page 166, says that all contracts repugnant to the welfare of the State, or against some maxim or rule in law, or in contradiction to some positive statute, are void. Then follow numerous instances. Mr. Comyn, in his work on Contracts, pages 59 to 67, enumerates many statutes upon which contracts have been declared by the courts to be void as *mala prohibita*, and it is not essential that the statute itself should declare the contract to be void.

The doctrine that a contract in violation of the provisions of a statute, though not expressly made void by it, is null and will not be enforced by the courts, is very distinctly stated and sustained by authorities in the case of the *Bank of the U. S. v. Owens*, 2 Pet. 538. JOHNSON, J., said: "No court of justice can in its nature be made the handmaid of iniquity. Courts are instituted to carry into effect the laws of the country; how can they become auxiliary to the consummation of violation of law? There can be no civil right where there can be no legal remedy, and there can be no legal remedy for that which is itself illegal." The same principles are recognized in *Coppell v. Hall*, 7 Wall. 558. Justice SWAYNE, commenting on the instruction of the court below, that the illegality had been waived by the act of the defendant, says: "In such cases there can be no waiver. The defense is allowed, not for the sake of the defendant, but of the law itself." Again, "Whenever

the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Where the contamination reaches, it destroys. The principle to be extracted from all the cases is, that the law will not lend its support to a claim founded on its own violation." See also *Bank v. Lanier*, 11 Wall. 369. And in *Bank of Augusta v. Earle*, 13 Pet. 587, TANEY, C. J., says: "It may be safely assumed that a corporation can make no contracts and do no acts within or without the State which creates it, except such as are authorized by its charter."

Coming now to our own State, a long line of decisions testifies that our courts will not lend their aid to enforce illegal contracts. In *Mitchell v. Smith*, 1 Binn. 110, a case of the sale and purchase of a Connecticut title to Pennsylvania lands, SHIPPEN, C. J., says: "The contract is illegal, being founded on the breach of the law, and of consequence is a void contract and cannot be enforced in a court of law." In *Siedenbender v. Charles, administrator*, 4 S. & R., it was held that there could be no recovery upon a ticket in an illegal lottery. TILGHMAN, C. J., said: "I consider it perfectly settled that an action cannot be sustained, founded on a transaction prohibited by statute, although it is not expressly declared that the contract is void." Page 160, YEATES, J., said: "The principle of public policy is, that no court will lend its aid to a man who grounds his action upon an immoral or illegal act. Justice as between these individuals would require either payment of the money or reconveyance of the property, but principles of public convenience demand that the justice of the case shall yield to higher considerations, the operation of the precedent on public morals and the public interest. It is for these reasons courts of justice will not assist an illegal transaction in any respect." In *Biddis v. James*, 6 Binn. 329, a case of lottery ticket also, TILGHMAN, C. J., states the same doctrine in fewer words. There is, therefore, no room for equitable presumptions, or estoppels, in cases of illegal contracts. Without protracting the statement too much, I may refer to the following cases of illegal contracts, which the courts have refused to aid by a recovery: *Maybin v. Coulon*, 4 Dall. 298; *Duncanson v. McLure*, id. 308; *Badgeley v. Beale*, 3 Watts,

263 ; *Kepner v. Keefer*, 6 id. 231 ; *Wagonseller v. Snyder*, 7 id. 343 ; *Clippenger v. Hepeaugh*, 5 W. & S. 315 ; *Filson v. Himes*, 5 Barr, 452 ; *Columbia Bank & Bridge Co. v. Haldeman*, 7 W. & S. 233 ; *App v. Coryell*, 3 Penn. 494 ; *Edgell v. McLaughlin*, 6 Whart. 176 ; *Brua's Appeal*, 5 P. F. Smith, 295. Two of these cases may be noticed particularly on the ground that the contracts were collateral to the illegal act, and that the court refused its aid. *Badgeley v. Beale* was for wages as a marker at an illicit billiard table ; and *Columbia Bank, etc. v. Haldeman*, was on a bond of indemnity to a stakeholder for paying over money won on a wager on an election. Here the bank, as plaintiff, asks to recover on an illegal mortgage ; and it follows, from the doctrine stated, that the court will not assist the illegal act ; and that the argument in regard to the State, being the only party to avail herself of the illegal forfeiture, has no place here. The defendant has the right to avail himself of the defense, and prevent a recovery. The doctrine of *Leazure v. Hilligas*, 7 S. & R. 313, and cases following in its track, is founded on the law of Pennsylvania as to corporations, that though they may take real estate, except for superstitious uses, yet they cannot hold it in consequence of the statutes of mortmain, but as the title has passed into the corporation, it must rest there, till the State enforces the forfeiture. This is very clearly shown by TILGHMAN, C. J., in that case. But in the case now before us, as we have seen, the act of Congress forbids the taking of a mortgage, except as a security for debts previously contracted. The disability attaches, therefore, to the acquisition, and not to the retaining of the mortgage. The transaction is without authority and illegal from the start, and the law will not enforce it. The defendant may, therefore, defend against it, not because of his own merit, but because the law will not suffer itself to be prostituted. This being the rule, it only remains to state the test adopted. "The test," says Judge DUNCAN, in *Swan v. Scott*, 11 S. & R. 164, "whether a demand connected with an illegal transaction is capable of being enforced at law is whether the plaintiff requires the aid of the illegal transaction to establish his case. If the plaintiff cannot open his case without showing that he has broken the law, the court will not assist him, whatever his claim in justice may be upon the defendant." This test has been repeated in the following cases : *Thomas v. Brady*, 10 Barr, 170 ; *Scott v. Duffy*, 2 Harris, 20 ; *Evans v. Dravo*, 12 id. 65. The mortgage of Fowler to the plaintiff is, on

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Scott v. National Bank of Chester Valley.

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its face, a security for future advances, and the schedule of the debts claimed under it shows also their subsequent character. The plaintiff could not open its case, therefore, without disclosing that it sought the enforcement of an illegal security—one forbidden by the law. The action must, therefore, fail.

*Judgment reversed.*

SHARSWOOD and WILLIAMS, JJ., dissented.

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SCOTT, plaintiff in error, v. NATIONAL BANK OF CHESTER VALLEY.

(72 Pennsylvania State, 471.)

*Bailment—Liability of bank for deposits for safe-keeping.*

In an action to recover of a bank the value of bonds deposited for safe-keeping by plaintiff, and stolen by the teller of the bank, *held*, that the bank being a gratuitous bailee was not liable, although an examination of the teller's accounts, after the theft, proved them to have been falsely kept, and showed that he had been abstracting funds for two years, and although it was known to the president of the bank that he had dealt once or twice in stocks. Mistaken confidence is not a ground of liability in such cases.\*

ACTION brought by John Scott, Jr., and Amos Scott, constituting the firm of Scott & Brother, against the National Bank of Chester Valley to recover the value of four government bonds of the value of \$1,000 each, which had been placed by plaintiffs with the bank for safe-keeping, and which had been stolen by a clerk or teller of the bank. It appeared that when the bonds were deposited the bank gave a check or card in the form: "Scott & Brother left with the bank a package containing valuable securities, said depositor assuming all risk from robbery or otherwise." The teller absconded after the theft, when, on examining his books, it was found that his accounts had been falsely kept for two years, and that he had abstracted funds to the amount of \$26,000. From the evidence he appeared to have had the confidence of the entire community as well as the bank officers. The cashier and president

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\* See *Wiley v. First National Bank*, *post*, and note.



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knew that he had dealt in stocks once or twice. The judge charged that the bonds were delivered to the officers of the bank as mere deposites, without any benefit to the depositor so far as had been proved, and for the convenience of the plaintiffs, and the bank was bound to no greater care of the deposit than a person of ordinary care and prudence generally takes of his goods of equal value. The bank was not bound to search into the accounts of the teller for the benefit of a gratuitous bailor, and his loss did not arise out of any account kept by the teller, but from a transaction outside of his employment. It is assumed that if the bonds were stolen by defendant's teller it is liable whether his propensity to steal was known or not, and without regard to his general character. We instruct you that there is no legal principle as applied to the loss of goods bailed without hire for the accommodation of the bailor. "The defendants had a verdict, whereupon the plaintiff brought error to this court."

*W. B. Waddell and W. Darlington*, with whom was *R. T. Cornwell*, for plaintiff in error, cited *Story on Agency*, § 452; *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. 215, 216.

*J. S. Futey and P. Frazer Smith*, with whom was *G. F. Smith*, for defendants in error, cited *Coggs v. Bernard*, 2 Ld. Raym. 909; *Mytton v. Cock*, 2 Strange, 1099; *Finucane v. Small*, 1 Esp. 315; *Shiells v. Blackburne*, 1 H. Black. 158; *Foster v. The Essex Bank*, 17 Mass. 479; *Tompkins v. Saltmarsh*, 14 Serg. & Rawle, 275; *Doorman v. Jenkins*, 2 Ad. & Ell. 256; *Lancaster County Bank v. Smith*, 12 P. F. Smith, 47.

AGNEW, C. J. As early as the case of *Tompkins v. Saltmarsh*, 14 Serg. & Rawle, 275, it was decided that a delivery of a package of money to a gratuitous bailee, to be carried to a distant place, and delivered to another for the benefit of the bailor, imposes no liability upon the bailee for its safe-keeping, except for gross negligence. In that case, the package was stolen from the valise of the bailee, at an inn, in the course of his journey, after it had been carried to his room, in the usual custom of inns in that day (1822). The same rule is laid down by Justice COULTER, *arguendo* in *Lloyd v. West Branch Bank*. He says, a mere depositary, without any special undertaking, and without reward, is accountable for the loss of the

goods only in case of gross negligence, which in its effects on contracts is equivalent to fraud. He further remarks, that the accommodation here was to the bailor, and to him alone, and he ought to be the loser, unless he in whom he confided, the bank or cashier, had been guilty of bad faith in exposing the goods to hazards to which they would not expose their own. These rules he derived from *Coggs v. Bernard*, 2 Ld. Raym. 909, and *Foster v. Essex Bank*, 17 Mass. 501. In the latter case the law of bailment was exhaustively discussed by PARKER, C. J., and the conclusions were as above stated. It was further held, that the degree of care which is necessary to avoid the imputation of bad faith is measured by the carefulness which the bailee uses toward his own property of a similar kind. When such care is exercised, the bailee is not answerable for a larceny of the goods, by the theft even of an officer of the bank. It is further said that from such special bailments, even of money in packages for safe-keeping, no consideration can be implied. The bank cannot use the deposit in its business, and no such profit or credit from the holding of the money can arise as will convert the bank into a bailee for hire or reward of any kind. The bailment in such case is purely gratuitous and for the benefit of the bailor, and no loss can be cast upon the bank for larceny, unless there has been gross negligence in taking care of the deposit. These appear to be just conclusions, drawn from the nature of the bailment. The rule in this case is restated by THOMPSON, C. J., in *Lancaster Bank v. Smith*, 12 P. F. Smith, 54. He says: "The case on hand was a voluntary bailment, or, more accurately speaking, a bailment without compensation, in which the rule of liability for loss is usually stated to arise on proof of gross negligence." That case went to the jury on the question of ordinary care, and hence the observation of the chief justice that the same idea was sufficiently expressed by the judge below, in using the words "want of ordinary care." It may be proper, however, to say that want of ordinary care is applicable to bailees with reward, when the loss arises from causes not within the duty imposed by the contract of safe-keeping, as from fire, theft, etc., and hence is not the measure in such a case as that before us, which we have seen in gross negligence. That case was one where the teller of the bank delivered the deposited bonds to a stranger calling himself by the name of the bailor, without taking sufficient care to be certain that he was delivering the package to the right person, and the bank was held

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responsible for his negligence. Then the teller, in giving out the deposit, was acting in his official capacity, and hence the liability of the bank. The case before us now is different, the bonds being stolen by the teller, who absconded. This teller was both clerk and teller, but the taking of the bonds was not an act pertaining to his business as either clerk or teller. The bonds were left at the risk of the plaintiffs, and never entered into the business of the bank. Being a bailment merely for safe-keeping for the benefit of the bailor, and without compensation, it is evident the dishonest act of the teller was in no way connected with his employment. Under these circumstances, the only ground of liability must arise in a knowledge of the bank that the teller was an unfit person to be appointed or to be retained in its employment. So long as the bank was ignorant of the dishonesty of the teller, and trusted him with its own funds, confiding in his character for integrity, it would be a harsh rule that would hold it liable for an act not in the course of the business of the bank, or of the employment of the officer. There was no undertaking to the bailor that the officers should not steal. Of course there was a confidence that they would not, but not a promise that they should not. The case does not rest on a warranty or undertaking, but on gross negligence in care-taking. Nothing short of a knowledge of the true character of the teller, or of reasonable grounds to suspect his integrity, followed by a neglect to remove him, can be said to be gross negligence, without raising a contract for care, higher than a gratuitous bailment can create. The question of the bank's knowledge of the character of the teller was fairly submitted to the jury.

But it turned out that after the teller absconded, his accounts were found to be false, and that he had been abstracting the funds of the bank for about two years, to an amount of about \$26,000. It was contended that the want of discovery of the state of his accounts for such a length of time, especially as he had charge of the individual ledger, was such evidence of negligence as made the bank liable. The court negatived this position, and held that the bank was not bound to search his accounts for the benefit of a gratuitous bailor, whose loss arose, not from the accounts as kept by him, but from a larceny, a transaction outside of his employment. We perceive no error in this. The negligence constituting the ground of liability must be such as enters into the cause of loss.

But the false entries in the books, and the want of their discovery, was not the cause of the bailor's loss, and not connected with it. True, the same person was guilty of both offenses, but the acts were unconnected and independent. True, the bank did not discover in time the injury he did to it, but the very fact that it did not discover his false entries and his peculations repels the knowledge of his dishonesty. The neglect was culpable, and might have led to responsibility to those with whom they had dealings, if they suffered from that neglect. But this neglect to examine into his accounts was not the cause of the bailor's loss. His loss was owing to the immediate act of dishonesty of the teller, and not to his purloining the funds, or falsifying the accounts of the bank. The argument of the plaintiff results simply in this : that mistaken confidence is a ground of liability. But if this were the rule, business would stand still ; for without a common degree of confidence in agents and officers, much of the business of the world must cease. The facts were fairly left to the jury, with the proper instruction.

Another complaint is, that the teller was suffered to remain in employment after it was known that he dealt once or twice in stocks. Undoubtedly the purchase or sale of stocks is not *ipso facto* the evidence of dishonesty, but as the judge well said, had he been found at the gaming-table, or engaged in some fraudulent or dishonest practices, he should not be continued in a place of trust. So, if the president of the bank, when he called on the brokers who acted for the teller in the purchase of the stock, had discovered that he was engaged in stock-gambling, or in buying and selling beyond his evident means, a different course would have been called for. No officer in a bank, engaged in stock-gambling, can be safely trusted, and the evidence of this is found in the numerous defaulters, whose peculations have been discovered to be directly traceable to this species of gambling. A cashier, treasurer, or other officer having the custody of funds, thinks he sees a desirable speculation, and takes the funds of his institution, hoping to return them instantly, but he fails in his venture, or success tempts him on ; and he ventures again to retrieve his loss, or increase his gain, and again and again he ventures. Thus the first step, often taken without a criminal intent, is the fatal step, which ends in ruin to himself and to those whose confidence he has betrayed. Hence any evidence of stock-gambling, or dangerous

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O'Hare v. Second National Bank of Titusville.

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outside operations, should be visited with immediate dismissal. In this case, the operations of the teller in stocks as a gambler in them, were unknown to the officers of the bank until after he had absconded. Upon the whole, the case appears to have been properly tried, and finding no error in the record, the judgment is affirmed.

*Judgment affirmed.*

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O'HARE V. SECOND NATIONAL BANK OF TITUSVILLE.

(77 Pennsylvania State, 96.)

*Loans in excess of one-tenth of capital stock.*

In an action against the indorser of a note discounted by a National bank it is no defense that at the time of the discount the maker of the note was indebted to the bank for money lent in excess of one-tenth of its capital stock.

ACTION upon two promissory notes indorsed by the defendant and discounted for the maker by the plaintiff, the Second National Bank. The defense was that the maker of the notes was, at the time of their being discounted, indebted to the plaintiff for money loaned in excess of one-tenth of its capital stock, and that the plaintiff was an accommodation indorser. Judgment was entered against the defendant for a want of a sufficient affidavit of defense.

*B. J. Reid and J. A. Neill*, for plaintiff in error.

*R. Sherman and M. C. Beebe*, for defendant in error.

AGNEW, C. J. The main question in these cases is, whether the notes in suit are illegal, and cannot be recovered upon, because at the time they were discounted the bank had previously lent the drawer, for whose accommodation O'Hare indorsed, more than one-tenth part of its capital. It is contended that the discount was contrary to the 29th section of the National Bank Law of June 3, 1864, providing that "the total liabilities to any associa

tion, of any person, or of any company, corporation or firm for money borrowed, including in the liabilities of a company or firm, the liabilities of the several members thereof, shall at no time exceed one-tenth of the amount of the capital stock of such association actually paid in: *Provided*, that the discount of *bona fide* bills of exchange drawn against actually existing values, and the discount of commercial business paper, actually owned by the person or persons, corporations or firms, negotiating the same, shall not be considered as money borrowed."

The affidavits of defense, upon which the question is raised, do not aver that the excess above one-tenth of the paid-in capital was knowingly and voluntarily lent to the drawer of the note. This defect in the affidavit would support the judgment, for surely it cannot be contended that an accidental excess made in mistake or in ignorance would forfeit an honest loan. But without resting the case on this defect, we cannot think that an excess known to the bank only is such an unlawful act, entering into the validity of the loan, as will avoid it. The fact of an excess of indebtedness over one-tenth of the paid-in capital is a matter aside from the loan itself, not entering into its terms, and, therefore collateral. The loan of the money is an act within the authorized power of the bank; a part of its proper business, and, therefore, not in itself illegal. The note or security given for the money was an instrument within the power of the bank to accept. The drawer had a right to make it, and the bank had a right to discount it. In this lies the difference between this case and that of *Fowler v. Scully*, 22 P. F. Smith, 456 (*ante*), relied on as authority. There the very instrument itself, a mortgage of real estate, for future advancement, was illegal and void, being forbidden to the bank as well as to the mortgagor, who is presumed to know the law. It appeared on the face of the mortgage that it was given to secure future discounts up to the sum of \$100,000, and for the express purpose of enabling the mortgagor "to avoid the necessity of procuring the additional indorsement to said paper by a third party." It therefore presented a case where both parties combined purposely to do an act expressly forbidden by the law, and where the thing itself (the mortgage) was the very ground of attempted recovery by law and of the court to enforce the illegal instrument. *Fowler v. Scully* is no authority for this case. What might be the consequence if the bank and Garfield, the drawer, had combined know-

ingly and willfully to defeat the restriction in the 29th section referred to, it is not proper to say or to speculate upon. Therein, however, lies the difference between the case of the *Morris Run Coal Company v. Barkley Coal Company*, 18 P. F. Smith, 174, cited and relied on in this case. There the contract was void because in restraint of trade, both parties were *in pari delicto*, and the draft sued on was the provided instrument for carrying the illegal agreement into execution. Hence, it was said there, "the illegal consideration entered directly into the instrument, and is followed up, because the law will not permit itself to be violated by mere indirection." Here the fact of the excess of the indebtedness, and the bank's knowledge of the fact, were only collateral to the contract of discount, and not presumed to be within the knowledge of the borrower, and the note was not intended by both parties to be the instrument of committing a fraud upon the law. Both the consideration and the note were lawful in themselves. The affidavit does not charge combination or conspiracy to defeat the law.

Other considerations connect themselves with the question. It was evidently not the intention of Congress to aim at the securities taken by the bank and declare them illegal, as it was in the 28th section, forbidding mortgages other than those taken to secure previously contracted debts. The securities not being referred to in the 29th section, or declared illegal, we are at liberty to inquire into the true purpose of Congress, in considering whether we should declare the securities themselves illegal by implication. If such were not the real intent of Congress, we ought not to raise an implication to defeat recovery. Evidently the limitation of the indebtedness to the one-tenth in the 29th section was intended as a general rule for conducting the business of the bank; a rule laid down from experience to regulate its loans for its own best interest and those of stockholders and creditors, not a rule to regulate its customers. It was, as remarked in *Fowler v. Scully*, a regulation to prevent these associations from splitting on the rock which has ruined so many banks, to wit, that of lending too much of their capital to one person or firm. The intention being to protect the association and its stockholders and creditors from unwise banking, we cannot suppose it was meant to injure them by forbidding recovery of the injudicious loans. We should not interpret the section so as to carry its prohibition beyond its true purpose, and thus cause it to destroy the very interest it intended to protect by the

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regulation. To do so would be, as said by the court below, to demand a penalty in favor of an individual for an offense against the country, and invite to dishonesty under a pretense of a regard for the law.

As to the usurious interest we shall say nothing, the defendant in error having, in his paper-book, agreed to correct the judgments by proper deduction. We leave the enforcement of this agreement to the court below, if the correction should not be voluntarily made.

*Judgment affirmed.*

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LUCAS V. GOVERNMENT NATIONAL BANK OF POTTSVILLE.

(78 Pennsylvania State, 228.)

*National bank — Usury — Set-off — Limitation of actions for excessive interest.*

Where a National bank exacts illegal interest on the discount of a note the interest-bearing power of the obligation is destroyed and there will be no time from which it can bear interest.

In an action by a National bank on negotiable paper discounted by it, the defendant may set off the amount of interest in excess of the lawful rate paid on other transactions. The interest paid by the defendant beyond that authorized by the act of Congress belongs to him, and the bank can hold it only for his use. \*

In such action, a State statute limiting the time within which action to recover excessive interest may be brought does not apply.

**A**CTION on promissory notes. The opinion states the case.

*D. A. Jones and J. W. & J. Ryon, for plaintiffs in error.*

*G. R. Kaercher, for defendant in error.*

GORDON, J. This was an action brought by the Government National Bank of Pottsville against John Lucas & Co., on two certain notes and one check, all of which were drawn by George J. Richardson to the defendants, and by them indorsed to the plain-

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\* See *Overholt v. Nat. Bank*, *post*, wherein this case is explained.



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tiff. John Lucas, on the part of the defendants, filed an affidavit of defense, setting forth, "That the said John Lucas & Co. were the payees on the notes and check upon which suit is founded, and that George J. Richardson was the maker. That said notes and check were sold to the said plaintiff at a discount of from 18 to 24 per cent per annum, and that the defendants received from the plaintiff the amount of said notes and check, less said rate of discount. In addition to the above, said plaintiff has received from George J. Richardson (corrected by a supplemental affidavit to read 'defendants,' instead of 'George J. Richardson'), on his (their) notes, not less than \$3,000 in excess of the legal rate of interest, the same having been purchased by the plaintiff at about the rate of 21 to 24 per cent per annum discount from the said defendants; and said defendants claim from the plaintiffs double the amount of interest under the act of Congress." On the 7th day of July, 1873, on motion of the plaintiffs' counsel, the court entered judgment against the defendants for the whole amount of the plaintiffs' claim with interest from and after the maturity of the paper, striking out and disallowing, however, 18 per cent, the amount of discount. The judgment is erroneous in that it includes interest on the paper in suit from the time it fell due. The act of Congress speaks in this wise: "And knowingly taking, receiving or charging a rate of interest greater than aforesaid, shall be held and adjudged a forfeiture of the entire interest which the note, bill or other evidence of debt carries with it, or which has been agreed to be paid thereon." Rev. Stat., § 5198.

Observe, it is the entire interest which the bill or note carries with it that is forfeited, and not merely that which the party borrowing may agree to pay. The illegal act destroys the interest-bearing power of the obligation, and as there can be no point in the history of such paper at which it is freed from the taint of illegality, so it follows there can be no point of time from which it can bear interest. The plaintiff was entitled to recover the face of the note and check, and no more. *Brown v. Second Nat. Bank of Erie*, 22 P. F. Smith, 209 (*ante*, p. 849).

Technically, the latter part of the affidavit of defense is bad, for it claims, as a set-off, that which the act of Congress imposes as a penalty on the usurious transaction, to wit, double the amount of interest paid. In this, defendants had no such interest as would enable them to use it by way of defalcation, for it could be ac-

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quired only through an action of debt under the statute; and until the forfeiture was pronounced in their favor, by judgment of the court, they had nothing therein which would be the subject of set-off. But, as we hold that the defendants are entitled to defalk the amount of the usurious discounts, which they paid the plaintiffs on previous transactions, we are disposed to treat the affidavit as faulty only in form, rather than substance. The money paid to the plaintiff, over and above that which the act of Congress authorized it to receive, belonged to the defendants, and the bank could hold it only for their use. This very point was raised and decided in *Thomas v. Shoemaker*, 6 W. & S. 179. That case ruled that usurious interest paid might be recovered back in an action for money had and received, and that it was not questionable, but that such interest secured on previous transactions might be defalked against the plaintiff's claim in the suit then pending. This decision was made under the act of 1823, then in force, by which, where more than legal interest was received, the money or other things lent was wholly forfeited.

The reason lying at the foundation of this and all similar decisions is very obvious. The receiving of such excessive interest is treated by the supreme power in the State as a public evil, and as such prohibited; consequently, when taken against the statutory prohibition, it is acquired without right, and no title thereto was in the taker. In such case he is to be held as one wrongfully in possession of his neighbor's property.

This reason applies *a fortiori* to the case in hand, for these National banks are the mere creatures of the act of Congress. From it they derive all the powers they possess; when, therefore, they act contrary to its express provisions and mandates, they usurp powers that do not belong to them, and such act is clearly *ultra vires* and void. In the case now in hand, if the affidavit of John Lucas be true, this bank has taken from the defendants some \$3,000, which the act of Congress has not only, in express terms, declared it should not take, but impose a penalty upon it for taking.

By no right, then, does the plaintiff hold this money; it has no property therein, and its possession thereof is but that of a trustee or bailee of the defendants.

Another error into which the court fell was in supposing that the case came within the provision of our act of March 28th, 1858,

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which provides, that where the debt and excessive interest have been paid, no action to recover back such excess can be maintained but within six months after such payment. But this case does not come under that act, but, as we have seen, under the act of Congress, which operates upon a subject of its own creation, and over which it has supreme control; hence our act cannot be made to supplement the National statute with a limitation not found in it. As the only limitation found in the act of Congress applies alone to the action for the penalty, it follows that the claim of the defendants can only be barred by a failure to sue for the same within the period of six years after it accrued.

*The judgment is reversed and a procedendo awarded.*

## FIRST NATIONAL BANK OF CARLISLE V. GRAHAM.

(79 Pennsylvania State, 106.)

*National bank—Deposits for safe-keeping—Liability of bailees.*

In an action against a National bank to recover bonds deposited with it for safe-keeping, without compensation, and which the bank alleged were stolen from its vaults, *held*, (1) that the bank was liable only for gross negligence; (2) that its failure to give prompt notice of the robbery was a question for the jury as bearing on the question of negligence; and (3) that while the mere voluntary act of the cashier in receiving the funds would not subject the bank to liability, yet if the deposit was known to the directors and they acquiesced in its retention, a contract relation was created by which the defendants would be held bound.\*

**A**CTION of assumpsit to recover the value of four United States bonds of \$1,000, cash, deposited with the defendant by the plaintiff for safe-keeping, and for which there was given to the plaintiff the following receipt:

“CARLISLE, Pa., October 22d, 1868.

“Miss F. L. Graham has left in this bank, for safe-keeping, four thousand dollars in U. S. 5-20 bonds of 1867, to be returned on the return of this receipt.

“CHARLES H. HEPBURN, Cashier.”

When the plaintiff demanded the bonds, they were not delivered to her, the officers of the bank informing her that they had been

\* See *Wiley v. First National Bank*, post, and note.

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stolen, August 5th, 1871, from the vault of the bank, with other valuables. The plaintiff alleged that the bonds were lost through the negligence of the defendant.

On the trial it was proved that the fact of the robbery had never been publicly disclosed. The officers feared that such a disclosure would injuriously affect the credit of the bank, and the president and cashier undertook, in their individual capacities, to become liable for the principal, interest and premium of the bonds of depositors that had been lost. Notice was given to the Assistant United States Treasurer in New York, and to the Treasury Department at Washington. The plaintiff was informed of the loss through her brother, residing in Monmouth, Ill., some bonds issued by an association there being among the securities lost. And notice was given to the association by the officers of the bank.

The verdict was for the plaintiff for \$4,790, and the defendant took writ of error.

*S. Hepburn, Jr., and W. F. Sadler*, for plaintiff in error.

*J. Hays, and J. H. Graham*, for defendant in error.

WOODWARD, J. [After deciding a question of evidence.] The next question is presented by the series of assignments which allege error in the instructions given to the jury as to the measure and extent of the responsibility of the defendants. Assuming for present purposes, on the faith of the verdict, that the act of the cashier was so far acquiesced in and ratified by the officers and directors, as to create a contract between the plaintiff and the bank, it is manifest that the contract amounted at the utmost to a naked bailment. It was a deposit without compensation. No undertaking was expressed except that the bonds were to be returned on the return of the cashier's receipt. The law regulating such a contract has been settled since the decision of *Coggs v. Bernard*, 2 Ld. Raym. 909, in the year 1703. "Where a man takes goods into his custody to keep for the use of the bailor," it was said by HOLT, C. J., in that case, "he is not answerable if they are stole without any fault in him, neither will a common neglect make him chargeable, but he must be guilty of some gross neglect." The principles which govern the relations between bailors and bailees are succinctly stated in Story on Bailments, § 23. "When the bailment is for the sole benefit of the bailor, the law requires only *slight*

diligence on the part of the bailee, and of course makes him answerable only for *gross* neglect. When the bailment is for the sole benefit of the bailee, the law requires *great* diligence on the part of the bailee, and makes him responsible for *slight* neglect. When the bailment is reciprocally beneficial to both parties, the law requires *ordinary* diligence on the part of the bailee, and makes him responsible for *ordinary* neglect." In *Tompkins v. Saltmarsh*, 14 S. & R. 275, DUNCAN, J., in delivering the opinion of the court, said: "Where one undertakes to perform a gratuitous act, from which he is to receive no benefit, and the benefit is to accrue solely to the bailor, the bailee is liable only for gross negligence, *dolo proximus*, a practice equal to a fraud. It is that omission of care which even the most inattentive and thoughtless men take of their own concerns. There is this marked difference in cases where ordinary diligence is required, and where a party is accountable only for gross neglect. Ordinary neglect is the want of that diligence which the generality of mankind use in their own concerns, and that diligence is necessarily required where the contract is reciprocally beneficial. The bailee without reward is not bound to ordinary diligence, is not responsible for that care which every attentive and diligent person takes of his own goods, but only for that care which the most inattentive take."

These principles were applied by COULTER, J., in *Lloyd v. The West Branch Bank*, 3 Harris, 176, and by the present chief justice in *Scott v. The National Bank of Chester Valley*, 22 P. F. Smith, 471 (*ante*, p. 864); and were recognized by THOMPSON, C. J., in *The Lancaster County Bank v. Smith*, 12 P. F. Smith, 54. In view of these well-established rules, the presentation to the jury of the legal aspects of this cause was inadequate and imperfect. There was no dispute that this was a gratuitous bailment, and in the general charge the court properly limited the responsibility of the defendant to a case of gross neglect. But this gross neglect was defined to be "the omission of those precautions which persons of common care and common prudence would naturally adopt, though they might, in reference to their own goods, omit them."

In the plaintiff's first point, the court were asked to charge that the defendants were "bound to exercise ordinary care, skill and diligence to keep and return the bonds safely; such care as men of ordinary prudence exercise in the care of their own property."

The answer was in these words: "First point affirmed, and for the meaning of gross negligence the jury are referred to the general charge. In the plaintiff's third point the court was asked to say, that "if the defendants were negligent, and did not exercise ordinary care, skill and caution, to keep the plaintiff's bonds safely, then they are liable for their value, no matter how negligent they may have been in taking care of their own property." The answer was: "Affirmed—see general charge." The defendants had the right to complain of the manner in which the cause was submitted to the jury. The standard of duty established for them was one to which they could not, under the evidence, be justly held. In the language of Judge DUNCAN, in *Tompkins v. Saltmarsh*, "they were responsible for the omission of care which even the most inattentive and thoughtless men take of their own concerns."

Upon the trial the ground was assumed by the defendants that there could be no recovery against them if the jury should find that they had taken the same care of the plaintiff's bonds that they had taken of their own securities, and complaint is now made of the failure of the court to sustain their position. In a multitude of cases language has been used by judges which would seem to indicate the existence of the rule for which the defendants contend. Such language was employed in *Foster v. The Essex Bank*, 17 Mass. 479, and in the cases already referred to, of *Coggs v. Bernard*, *Lloyd v. The West Branch Bank*, and *Scott v. National Bank of Chester Valley*. In general, however, this view of the law has been abstractly stated, and where it has been applied, as in *Lloyd v. The West Branch Bank*, the diligence used by the bailee in the oversight equally of the deposit and his own property, correspond with that diligence to which, in the circumstances of the particular bailment, the law held him bound. The authorities relied on by the defendants "do not seem," Judge STORY has said, "to express the general rule in its true meaning. The depositary is bound to slight diligence only, and the measure of that diligence is that degree of diligence which persons of less than common prudence, or indeed of any prudence at all, take of their own concerns. The measure, abstractly considered, has no reference to the particular character of an individual, but it looks to the conduct and character of a whole class of persons." Story on Bailments, 564. The fact that the bailee keeps the property of the bailor,

with the ordinary care with which he keeps his own, does not fulfill the measure of his legal duty where the contract is one which requires strict diligence and extraordinary care. So, under a contract of bailment, in which the benefits are reciprocal, the bailee is not shielded from liability for neglect of ordinary care by proving that he has been careless, inattentive and reckless in the management of his goods as well as those of the bailor. Cases for the application of the maxim of the Emperor Constantine, quoted in Jones on Bailments, 83, "*Aliena negotia exacto officio gerunter*," must constantly arise. The terms used in the authorities referred to are employed more by way of illustration than as a statement of the legal rule. That the bailee has dealt with his property and the bailor's in the same way is a fact which may be always shown as an element in adjusting the standard of duty, and deciding the question of its performance, as well as a test of the bailee's good faith. On the proof of such a fact, a presumption of adequate diligence would ordinarily arise. But the question of the bailee's responsibility must be finally settled by a resort to the settled principle which deduces the measure of his duty in each particular bailment, from a comparison of his conduct with the conduct not of individuals, but of classes of men. The instructions of the court on this subject in the general charge were, that, if the bailee "takes the same care of the goods bailed that he does of his own, that ordinarily repels the presumption of gross negligence. The desire to preserve one's own property from loss from any cause is, as a rule, so universal, that the mind rests with satisfaction on the evidence which shows the same care of the bailed property which the bailee took to save his own, unless it was shown that he was grossly negligent of both, and when this is done he is not excused, but held answerable." It is conceived that these instructions were unobjectionable. Whether the defendants were guilty of such gross negligence as to make them liable, was a question which, like that which was raised as to the fact of robbery, and like the other issues involved, it was for the jury, under all the evidence, exclusively to decide.

Another error is alleged to have consisted in the answer by the court to the plaintiff's seventh point, relating to the failure of the bank to give notice of the robbery, and in the direction given to the jury on the same subject in the general charge. The discussion of the point undoubtedly was unduly amplified. The limita-

tion of the plaintiff's right to a verdict only in the event that gross negligence should be made out, was neither expressed nor implied. The instruction in substance was, that she could recover if injury resulted to her from the failure of the defendants to give her notice, and that she could recover for such injury, if found, even though the presumption of negligence arising from the want of notice was repelled by proof. The effect of such a direction could only be to leave the precise question on which the jury were to pass in obscurity and doubt. The plaintiff in her testimony stated that she received intelligence of the loss through her brother in Monmouth three or four weeks after it occurred. Charles H. Hepburn thought the interval between the loss and the conversation he had with the plaintiff in regard to it was only eight or ten days. From the time she received notice, if upon a fair representation of their views and motives, she acquiesced in the policy of silence which the officers of the bank had adopted, it would be unjust to permit her to set up the subsequent maintenance of that policy as a ground for the imputation of gross negligence against the defendants. But the fact that no announcement was made in the interval, whatever it was before the plaintiff was informed of the loss, was fairly a subject for the consideration of a jury. It was for them to weigh it in connection with the other evidence, in deciding the material issues in the cause. Its relevancy and value are shown by the significance that was attached to the proof of the conduct of a bailee contemporaneously with and immediately after a loss of property, in *Tompkins v. Saltmarsh*, *supra*. "I am of opinion likewise," Judge DUNCAN said, "that evidence ought to have been received of the hue and cry immediately after the discovery — his assiduous and indefatigable pursuit, and strict search, both at the inn and the steamboat. If he had made no complaint or inquiry, remained with his arms folded and his mouth shut, this would have afforded strong evidence of his delinquency; and though it has been said this would have been the course of a guilty man, yet it is one which an innocent man would naturally take, and which, if he did not take, all would condemn him. Nothing would more strongly prove his neglect than this silence, this indifference; the jury would have drawn the most unfavorable conclusions from it." Every case must stand, of course, on its facts. It may well be that the reasons for the action of the officers of the bank would be satisfac-



tory to a jury, but the necessity is inevitable of submitting the question to them whether that action involved gross neglect.

The remaining question arises out of the answer of the court to the second point of the defendants. The mere voluntary act of the cashier in receiving the plaintiff's securities would not subject the bank to liability. But if the deposit was known to the directors, and they acquiesced in its retention, a contract relation was created, by which the defendants should be held bound. The question arose in *Foster v. The Essex Bank*, 17 Mass. 479. That was an action to recover the value of a special deposit. The bank had no express power by charter to receive deposits of any kind, but the verdict found that the practice had been to receive them always; and PARKER, C. J., said: "As the bank from the time of its incorporation has received money and other valuable things in this way, and as the practice was known to the directors, and we think must be presumed to have been known to the company, as far as a corporation can be affected with knowledge; and as the buildings and vaults of the company were allowed to be used for this purpose, and their officers employed in receiving into custody the things deposited, the corporation must be considered the depository, and not the cashier or other officer through whose agency commodities may have been received into the bank. The rule thus stated has been uniformly applied by this court in cases involving the rights and duties of the National banks. The principle announced in the recent New York and Vermont cases of *The First National Bank of Lyons v. The Ocean National Bank*, 19 Am. Rep. 181 (*ante*, p. 728), and *Wiley v. The First National Bank of Brattleboro*, *id.* 122 (*post*, p. 905), has never been adopted here, so far as it is in conflict with the rule. If the question here had grown out of an act prohibited by law, the principle of these recent authorities would be applicable, as it was applied in *Fowler v. Scully*, 22 P. F. Smith, 456; S. C., 13 Am. Rep. 699 (*ante*, p. 854). But the question arises out of an act which has been neither directly nor impliedly forbidden by statute. The answer of the court was accurate, and the complaint alleged against it in the supplemental assignment of error is unfounded.

*Judgment reversed, and a venire facias de novo awarded.*

## DE HAVEN V. KENSINGTON NATIONAL BANK.

(81 Pennsylvania State. 95.)

*Negligence in keeping\* deposits for safe-keeping.*

Whether or not a National bank has the power to take bonds, etc., on deposit for safe-keeping, it is not liable for the loss of such property so taken without compensation, unless it has been guilty of gross negligence contributing to the loss.\*

ACTION against a National bank to recover the value of certain bonds which plaintiff had deposited with the defendant for safe-keeping and which had been stolen from defendant's possession. Defendant was a gratuitous bailee of such property. The evidence tended to show that during the day on which the bonds were stolen a man dressed as a police officer told the cashier, in presence of a watchman of the bank, that he had been directed by the lieutenant of the police to warn him that there were "suspicious characters about;" the cashier told the watchman to admit no one, but he made no inquiry of the lieutenant. After the bank was closed, there then being another watchman there, the first was called from the outside by name; he opened the door; a man dressed as a policeman and two others in ordinary dress came in; they overpowered the watchman, took securities, etc., from the vault, including plaintiff's.

On the evidence the court directed a nonsuit and plaintiff took a writ of error.

*D. W. Sellers*, for plaintiff in error.

*A. D. Campbell & R. C. McMurlee*, for defendant in error.

Per CURIAM. We discover no sufficient evidence in this case to charge a mere voluntary bailee, without reward, for a loss by robbery. Waiving the question of the want of power in a National bank to take bonds, etc., on a deposit for safe-keeping, the officers here took as much care of them as they did of the property of the

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\* See *Wiley v. First National Bank*, post.

## Overholt v. National Bank of Mt. Pleasant.

bank. The robbery was effected by a most ingenious and unexpected device, calculated to succeed with the most careful of persons, and made successful by its very openness and apparent freedom from design. The cashier had no reason to suspect an attack on *his* bank, the message of the pseudo police officer being merely that there were suspicious persons about; that is, in the city. Hence his omission to call at the police precinct was no evidence of such carelessness as would charge the bank. He took all proper precautions. The nonsuit was properly granted.

*Judgment affirmed.*

## OVERHOLT V. NATIONAL BANK OF MT. PLEASANT. \*

(82 Pennsylvania State, 490.)

*Usury—Effect of—What interest forfeited—Set-off of illegal interest.*

Where National banks stipulate for an illegal rate of interest all payments of interest, and not merely the excess, is illegal.

In an action by a National bank to recover the amount of a note which was given in renewal of other notes, the defendant is entitled, where illegal interest has been exacted, to credit for all the interest he has paid from the beginning on the loan and not merely to the excess above the lawful rate.

In an action by a National bank on a promissory note the defendant cannot set off the entire interest agreed to be paid on another and independent note although such interest was usurious.\*

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\* See *Farmers and Mechanics' National Bank v. Dearing*, ante, pp. 117, 122, 123; *Tiffany v. National Bank*, ante, p. 90; *Central National Bank v. Pratt*, ante, p. 595; *Davis v. Randall*, ante, p. 600; *First National Bank v. Garlinghouse*, ante, p. 811; *Shinkle v. Bank*, ante, p. 824.

In *Crocker v. First National Bank*, ante, p. 317, it was held that in an action to recover the penalty for taking illegal interest, the recovery should be twice the full amount of interest paid, and not twice the excess of interest paid over the legal rate. The same rule was held in *National Bank v. Davis*, ante, p. 350.

On the other hand in *Hintermister v. First National Bank*, ante, p. 741, it was decided that in an action to recover such penalty the recovery could only be twice the amount taken in excess of the legal interest. ALLEN, J., who delivered the opinion of the court, said: "With great hesitation we incline to favor this interpretation of the penal clause under consideration," and *Brown*

**A**CTION of assumpsit by the First National Bank of Mt. Pleasant against Overholt and others, upon two promissory notes which were discounted by said bank.

Defendants in their affidavit of defense alleged that upon various renewals on the first note in suit they had paid the plaintiffs \$1,-057.16 as interest, at the rate of nine per cent per annum; upon renewals on the second note in suit, \$1,087.30 as interest, at the rate of eight and nine per cent per annum; and upon the renewals upon a third note not in suit, for \$4,000, dated April 3d, 1872, they had paid plaintiffs \$1,314.09 interest, at the rate of nine per cent, and claimed to set off double the amount so paid as interest on each note, making an aggregate of \$6,917.10, or so much thereof as would extinguish plaintiff's claim.

A rule for judgment for want of a sufficient affidavit of defense was taken by plaintiffs, which the court made absolute, and delivered the following opinion :

"The cases of *Brown v. Second National Bank of Erie*, 22 P. F. Smith, 209 (*ante*, p. 849), and *Lucas v. Government National Bank*, 28 id. 228 (*ante*, p. 872), establish that whilst all the interest is forfeited upon the obligation in suit, yet that the forfeiture of double the interest cannot be defalked until acquired by recovery in action of debt. The affidavit of defense, therefore, in this case is good as to the interest of the obligation in suit, but not good in so far as it seeks to defalk double that interest. The same principle makes the affidavit at fault in trying to set off double the interest on previous renewals. As to these having been paid by the renewals, the liability to forfeiture of double the interest was incurred, but this, as we have seen, can only be enforced after recovery by action. Still the excess over the legal rate retained in these renewals can be set off.

"The \$4,000 note has its origin since the notes in suit, and is yet unpaid. Its excess interest, as well as penalty, if recovered, can be defalked against its principal. The affidavit and its schedule advise us that this note is mature, and it is not alleged to be out of first hands. The balance yet due upon it exceeds the entire

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*v. Second National Bank*, *ante*, p. 849, was cited as an authority for that conclusion, but the case can hardly be considered an authority therefor.

As to the recoupment of interest, see *National Bank v. Davis*, *ante*, p. 350; *Wiley v. Starbuck*, *ante*, p. 436; *Brown v. Second National Bank*, *ante*, p. 849.

As to actions for recovery of penalties, see *Missouri, etc., Co. v. First National Bank*, *ante*, p. 401; *Newell v. National Bank*, *ante*, p. 501; *Ordway v. Central National Bank*, *ante*, p. 559.

penalty, and no equity invites us to allow the usurious interest collected upon its renewals to be used as set off here. 'One danger of doing so is illustrated by the fact that this same note is sought to be used as a defense between the same parties in Nos. 513 and 514 of the same term as this. Wherefore [judgment is entered in favor of the plaintiff for \$3,485.18 (being principal of notes in suit, less excess interest paid), to which amount no sufficient affidavit of defense has been filed, and with the usual per cent attorney's commission, and with leave to plaintiff to file forthwith his præcipe under Rule 13 as to balance of his claim.]"

There were three other cases: one against an indorser on one of the notes in suit; one against B. F. Overholt & Co. on other notes: and one against the indorser of the latter, which were ruled by the court as above in the same opinion, and which it was agreed should be determined by the decision in this cause.

The defendants took this writ and the errors assigned were: 1. In entering judgment for want of a sufficient affidavit of defense. 2. In entering judgment as above in brackets. 3. In refusing to allow defendants credit for the whole amount of interest charged, whether paid or not, both on the notes in suit, the previous renewals thereof, and on note or notes not in suit. 4. In refusing to decree forfeiture of all the interest paid on the several notes set forth in the affidavit of defense. 5. In refusing to allow the defendant to set off the excess of interest paid upon the \$4,000 note, and the series of renewals of which it was the last, said note being dated 14th February, 1875, is unpaid, and not yet sued upon.

*Edgar Cowan and Markle & McCullough*, for plaintiffs in error.

*A. M. Fulton*, for defendant in error.

SHARSWOOD, J. The 30th section of the act of Congress of June 3d, 1864, under which the defendants in error were organized and incorporated as a National bank declares that "the knowingly receiving, reserving or charging," by a National bank, "a rate of interest greater than" that lawful in the State in which such bank may be located, "shall be held and adjudged a forfeiture of the entire interest which the note, bill or other evidence carries with it, or which was agreed to be paid thereon; and in case a greater interest has been paid, the person or persons paying the same or their legal representatives may recover back in any action of debt

twice the amount of interest thus paid from the association taking or receiving the same : provided, that such action is commenced within two years from the time the usurious transaction occurred."

It is very clear we think that Congress intended that the National banks should be effectually prevented, as far as legislation could prevent it, from either charging or receiving more than the legal rate of interest in the States in which they might be located and carry on their business. Experience had abundantly shown that to do this it would not be sufficient to provide that the excess over the lawful rate only should be illegal. These institutions of large capital would naturally exercise great power over those who should stand in need of their assistance ; for it is as true now as it was in the days of Solomon, "The rich ruleth over the poor and the borrower is servant to the lender." It was considered, no doubt, that it would be too severe a measure to provide that the debt itself should be forfeited or the security given for it declared void. That too had been tried in England and some of the United States, but was found not to arrest the practice, but only to increase the unjust gain of the usurer, who required to be indemnified by the needy borrower for the risk he run by a much increased rate. It was deemed a sufficiently effectual prevention to enact that wherever the bank violated the law by "knowingly receiving, reserving or charging" more than the lawful interest, they should recover none, and that where the unlawful interest had been voluntarily paid, the debtor should be entitled to recover as a penalty double the whole interest paid, provided suit were brought within two years. Wherever the bank must resort to a suit, there the forfeiture of the entire interest, when an illegal rate has been stipulated or taken, follows as a necessary result. It was abundantly shown in *Campbell v. Sloan*, 12 P. F. Smith, 485, by numerous English and American authorities cited in the opinion of the court, that where there has been a series of renewal notes given for the continuation of the same original loan or advance, the taint of usury in the first transaction follows down the descent through the entire line. A renewal note is not payment of the original debt, and a new debt or novation in view of the usury laws, however it may be, if the parties so intend, as to other questions. If it were held otherwise nothing would be so easy as to evade the statute. What the creditor is entitled to recover is the original loan with lawful interest, and the borrower is entitled to credit for all that he has paid beyond

what by law he was bound to pay. It is clear then as to the National banks that whenever they charge or stipulate for an illegal rate all payment of interest and not merely the excess is illegal. "The Illegal Act," as is well remarked by Mr. Justice GORDON in *Lucas v. Government National Bank*, 28 P. F. Smith, 231 (*ante*, p. 872), "destroys the interest-bearing power of the obligation." "The receiving of such excessive interest is treated by the supreme power in the State as a public evil and as such prohibited; consequently when taken against the statutory prohibition, it is acquired without right and no title thereto vests in the taker. In such case he is to be held as one wrongfully in possession of his neighbor's property." It follows that when the bank resorts to legal proceedings to recover its debt on the last of the series of renewal notes, the borrower is entitled to credit for all the interest he had paid from the beginning on the loan and not merely to the excess above the lawful rate.

This question was not before the court, and was not decided in *Brown v. Second National Bank of Erie*, 22 P. F. Smith, 209 (*ante*, p. 849). The only matters which could avail the plaintiff in error there, were the answers to the two first points which he made below. These were, that the bank could not recover any part of its claim, and that if it could the debtor was entitled to defalk double the amount of interest paid. These the court below refused, and their judgment was affirmed. His third point was, that he was entitled to credit for the excess of the interest he had paid from time to time on the renewal notes; and his fourth was, that he was entitled to an abatement of all the interest on the note in suit; and these the court below affirmed. What is stated in the syllabus as decided by the court below—if indeed it was meant to say that the debtor could only set off the excess of interest on previous notes—was not involved in the affirmance of the judgment. In *Lucas v. Government National Bank*, 28 P. F. Smith, 228 (*ante*, p. 872), the credit claimed was not for interest paid on former notes of which the note in suit was the last renewal, but upon entirely independent loans which had been paid in full; and the defendant claimed to defalk double the amount which he had paid. This the court held he could not do, but that he was entitled to defalk the usurious interest he had paid on previous transactions. The affidavit of defense stated that the defendant had paid not less than \$3,000 in excess of the legal rate of interest; and this, it was held, he had

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a right to defalk. Further than this it was not necessary to go in order to reverse the judgment and award a *procedendo*.

We are of opinion that the defendant below was not entitled to defalk the interest on the four-thousand-dollar note, which was not in suit. The words of the act of Congress, "shall be held a forfeiture of the entire interest which the note, bill or other evidence carries with it," as was said in *Brown v. The Second National Bank of Erie*, have evident reference to the enforcement of the contract by judicial process. No action is given to recover back the interest charged, and if not, there can be no defalcation against an independent claim. *Non constat* that the principal of the four-thousand-dollar note will ever be sued for; but when it is, all the interest paid on the notes of which it is the last renewal will be a credit upon it.

*Judgments reversed and writs of procedendo awarded.*

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## Woods v. PEOPLE'S NATIONAL BANK OF PITTSBURGH.

(83 Pennsylvania State, 57.)

*Mortgage on real estate to National bank.*

A mortgage to a National bank is valid as to pre-existing debts, but void as to future loans.\*

**A**SSUMPSIT against Robert Woods as indorser of three promissory notes.

In 1869 and 1870 Robert Woods, the defendant below, indorsed three accommodation notes of R. L. McAbey, to the amount of \$7,000, which notes were discounted by the People's National

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\*That a mortgage of real estate to a National bank to secure a contemporaneous or a future loan is void, was held in the following cases: *Kansas Valley National Bank v. Rowell*, ante, p. 264; *Merchants' National Bank v. Mears*, ante, p. 353; *First National Bank v. Haire*, ante, p. 480; *Ornn v. Merchants' National Bank*, ante, p. 490; *Matthews v. Skinker*, ante, p. 647; *Crocker v. Whitney*, ante, p. 745; *Fowler v. Scully*, ante, p. 854.

For special circumstances under which a mortgage to a National bank has been held valid, see *First National Bank v. Haire*, ante, p. 480; *Ornn v. Mer-*



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Bank of Pittsburgh, the plaintiff below. In March, 1870, the bank loaned McAboy \$5,055 upon his own note unindorsed. On September 1st, 1870, the wife of McAboy executed a mortgage to the bank for \$20,000 to secure the above notes and to secure an additional loan to McAboy of \$8,000, which latter was made to him September 8th, 1870, McAboy giving the bank two notes for \$4,000 each. The notes indorsed by Woods were subsequently renewed. Afterward, upon default in payment of the various notes, the bank brought suit upon its mortgage and recovered \$13,564.82 upon it, and then brought this action against Woods upon the notes indorsed by him. Upon these facts the court below (Stowe, A. J.) instructed the jury to find for the plaintiff, which they did in the sum of \$9,228.94. After judgment the defendant below took this writ of error, assigning for error the charge of the court and the refusal of evidence of an admission made by the president of the bank tending to show the *purpose* for which the mortgage in question was given to it.

*Hampton & Dalzell*, for plaintiff in error.

*M. W. Acheson* and *W. L. Chalfant*, for defendant in error.

PAXON, J. It was held in *Fowler v. Scully*, 22 P. F. Smith, 456, that the loaning of money by a National bank upon mortgage or other real estate security is *ultra vires*, and forbidden by the act of Congress. This of course does not apply to the case where a bank has in good faith taken a mortgage by way of security for a previously existing debt. Such case comes within one of the express exceptions of the act of Congress. It follows, therefore, that in so far as the mortgage of Mrs. McAboy to the People's National Bank of Pittsburgh was given to secure money thereafter to be loaned to her husband, it was *ultra vires*. It is manifest from

*chants' National Bank*, ante, p. 490; *Upton v. National Bank*, ante, p. 618; *Richards v. Kountz*, ante, p. 652.

A National bank may sell real estate owned by it and take back a mortgage for the purchase-money. *New Orleans National Bank v. Raymond*, ante, p. 516. So a National bank may purchase such real estate as may be necessary to secure a debt due it, though the value of the property be in excess of the debt provided the intent be *bona fide*. *Upton v. National Bank*, ante, p. 618.

See *Allen v. Freedman's Savings and Trust Co.*, 14 Fla. 418, wherein it was held that one who has borrowed money from a bank upon securities on which it was prohibited from lending, cannot avail himself of the prohibition as a defense to an action for the money.

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CAKE v. The First National Bank of Lebanon.

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the evidence that the loan of \$8,000 to Mr. McAboy on or about the 8th of September, 1870, was upon the faith of the mortgage. As to this loan the mortgage was not a valid security. But it was good as to the indebtedness of Mr. McAboy to the bank existing prior to its execution, amounting to about \$12,055. For \$7,000 of this sum the bank held the indorsements of the plaintiff in error. His contention is that the bank was bound to apply the money received from a sheriff's sale of the mortgaged premises to the notes held by it at the time the mortgage was given. In this we think he is right. As the indorser of Mr. McAboy's notes, held by the bank, he had a right to call upon the latter to apply the money to the payment of the notes for which alone the mortgage was legally held as security. The mortgage was as much for his benefit as for the bank. The latter has no right to apply the proceeds thereof to the two unsecured notes of \$4,000 each. Under the authority of *Fowler v. Scully, supra*, Mr. McAboy could have objected to such appropriation. Whatever he might have done in this respect, the plaintiff in error as his indorser may do also.

From what has been said it will be seen that both the assignments of error are sustained.

*The judgment is reversed, and a venire facias de novo awarded.*

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CAKE V. THE FIRST NATIONAL BANK OF LEBANON.\**Renewal notes — Acceptance of — Set-off for usury.*

Whether other notes have been accepted by a bank in renewal of notes sued on is a question for the jury.

Where there has been a series of renewal notes given for the continuation of the same original loan, a taint of usury in the first transaction follows down through the whole, and in an action by a National bank on the last of the series, the borrower is entitled to credit for *all* the interest he has paid from the beginning.†

**A**CTION against the defendant as an accommodation indorser of a draft and a note, discounted by the plaintiff, a National bank, for the maker, Stine.

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\* Not yet reported in the Pennsylvania Reports.† See *Overholt v. Bank, ante*, p. 883.

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Cake v. The First National Bank of Lebanon.

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*Sharp & Alleman*, for plaintiff in error.

*A. L. Smith*, for defendant in error.

SHARSWOOD, J. We think the first, third, fourth and fifth assignments of error must be sustained, but not the second.

The defendant below was accommodation indorser for Stine on two notes, which had been discounted by the bank, and being unpaid at maturity were duly protested. Stine procured Cake to indorse renewal notes, and sent them to the bank, who retained them until at least after one of them had fallen due, and then informed Stine that they had not accepted them. No notice of non-payment was given Cake on these notes. This suit was instituted on the first notes. It is the very case of *Hart v. Boller*, 15 S. & R. 162, in which this court held that it was error to take from the jury the question whether the renewal notes were accepted in payment.

We think, too, that *Overholt v. The National Bank of Mt. Pleasant*, 1 Norris, 490, is directly in point on the question raised as to the usurious interest received by the bank. It was there decided that where there has been a series of renewal notes given for the continuation of the same original loan, the taint of usury in the first transaction follows down the descent through the whole line, and when therefore a National bank sues to recover its debt on the last of the series of renewal notes, the borrower is entitled to credit for all interest he has paid from the beginning on the loan, and not merely to the excess above the lawful rate.

*Judgment reversed, and venire facias de novo awarded.*

## MAYNARD V. BANK.

(1 Brewster, 483.)

*Conversion of State bank into National bank — Effect of.*

The conversion of a State bank into a National bank, under the act of Congress of June 3d, 1864, did not work an annihilation or dissolution, but only a change of the bank.

Such change does not adeem a residuary legacy in certain shares of the bank, limited upon a life estate in such shares which is to become an absolute one, in case the bank should pay off or refund its stock, by reason of the expiration of its charter or from any other cause. The change is not equivalent in law, to a paying off in fact, and the residuary legatee is entitled to the stock on the death of the legatee for life.

*M. Arnold, Jr.*, for complainant.

*Furman Sheppard*, for defendant.

*W. J. McElroy*, for the bank.

BREWSTER, J. This case has been argued on bill and answer. The object of the proceeding is to test the title to 34 shares of stock of the Mechanics' National Bank of this city.

All the relief sought for by the complainant, save the injunction, could be obtained at law; but as the parties have elected this forum, we have endeavored to consider the case and the able argument on both sides with care.

The stock in controversy was owned by Anthony Finley in his life-time. By his will he bequeathed the dividends thereon to his sister, Eliza Finley, for her sole use during her natural life. Then follow the words which have given rise to this litigation: "I do hereby will," the testator says, "that if, at any time during the life of my said sister, the whole or any part of said stock shall be paid off and refunded, by the expiration of the charter, or from any other cause whatsoever, then the amount so paid off and refunded shall be paid to my said sister, for her sole and absolute use and benefit forever."

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Maynard v. Bank.

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The bill avers that neither the whole nor any part of the stock has been paid off and refunded, but that the same still stands in the name of Anthony Finley on the books of the bank; that Eliza Finley died in the early part of this year; that the complainant, as residuary legatee of Anthony Finley, is entitled to the stock, and as executrix of his will is privileged to transfer it; but that the bank, having been notified of a claim to said stock by William Ayres, has refused to permit the complainant to transfer it.

The answer of the defendant Ayres, admitting all the averments of the bill save that of title in the complainant, presents a claim to the stock founded upon the fact that the bank was formerly a State institution; that, having become "an association for carrying on the business of banking under the laws of the United States," it is "to be deemed as having surrendered its charter," and that thereby the stock became the property of Eliza Finley, precisely as if it had been paid off and refunded as provided for by the will.

The answer of Mr. Ayres then presents his title through Eliza Finley, under an instrument of date February 18th, 1867, whereby, in consideration of his agreeing to pay her an annuity of \$125, she transferred to him *inter alia* this stock.

She died before the first installment of the annuity fell due, but his rights are the same as if she had lived many years.

The question, therefore, is simply this: Was the change from a State to a National bank a paying off and a refunding of the stock? It is very clear that the shares were never, in fact, paid off; for had this been done, Eliza Finley would have had the cash. I do not dwell on the word "refunded," which, in strictness, meaning "to pour back," was evidently used by the testator as a synonym for "paid," which is also one of its definitions.

The complainant says the stock has never been paid off or refunded, but that it still stands in the name of Anthony Finley. The defendant does not deny this averment, but simply contends that by the change in the character of the institution the shares "became vested in the said Eliza Finley for her sole and absolute use." The answer to this is, that the will does not so read. The testator does not say if this bank shall surrender this charter or become a National bank the stock shall belong to Eliza Finley; but, regarding it probably as the best investment of the money, and willing that she should have the dividends for life, he yet

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foresaw that from some cause the shares might be paid off, and in that contingency she was to be the absolute owner of the money. She might, perhaps, have claimed an appraisal of the stock, but it is useless to inquire whether she had this right, for if possessed of it, she never exercised it, and was content to allow the stock to stand, as it had stood since her brother's decease, in his name. Unless, therefore, the defendant can establish the impossible proposition that stock still outstanding has been paid off, his case would seem to be hopeless.

Since, then, these shares were never paid off by the bank or received by the legatee, it would seem to be unnecessary to consider the question presented by the defendant Ayres, that this change in the character of the bank was equivalent to a refunding of the stock, or, in other words, was a payment in law if not in fact. The act of Congress under which this transition occurred was approved June 3d, 1864. The 44th section, 15 Stat. at Large, pp. 112, 113, enacts that any bank incorporated by special law of any State may become a National bank, and the required certificate may be made by the directors, and they must certify that two-thirds of the stockholders have authorized them to change and convert the bank into a National bank. It would seem, therefore, that there was to be no annihilation or dissolution, but rather a "change." But were this otherwise, it would seem to be well settled that the transformation from State to National bank stock did not adeem the legacy, for an ademption can only take place in the life-time of the testator, and the principles governing such cases would seem to be conclusive against the defendant. See 1 Roper on Legacies, 240, 241; *Walton v. Walton*, 7 Johns. Ch. Cas. 258, and *Bringham v. Cuthbert*, 6 Binn. 398.

*Let a decree be drawn for the complainant.*

## LOCKWOOD v. THE AMERICAN NATIONAL BANK.

(9 Rhode Island, 308.)

*National banks — Directors — Qualification of — By-laws.*

Where no qualification is required and there is no usage to control, a person who is elected a bank director is presumed to accept the office unless he decline it. This presumption may be rebutted. Whether simple non-action as a director, for five months, would be ordinarily sufficient to rebut it — *query*. But where the stockholders of a bank, in an instrument authorizing its conversion from a State to a National bank, named all the directors who had been elected at the last annual election as those who are now directors of said bank," the court cannot hold that two of those so named were not directors at the time of such conversion, because they had never acted in that capacity since their election five months previously.

By the provisions of section 44 of the National Banking Act, upon conversion of a State to a National bank, all the directors of the former become those of the latter, until an election or appointment by the National bank. *Semble*, that no oath is required from these *ad interim* directors, the oath prescribed by section 9 of the aforesaid act being designated for those regularly elected by the National bank, but, assuming its necessity, a majority of those who were the directors of the State bank before its conversion is necessary to make a quorum of the board of the National bank.

In all cases where an act is to be done by a corporate body or a part of a corporate body and the number is definite, a majority of the whole number is necessary to constitute a legal meeting, although at a legal meeting, where a quorum is present, a majority of those present may act.

Hence, a by-law adopted at a meeting of six *ad interim* directors of a National bank, which had twelve directors before its conversion, is invalid, because not adopted by a majority or quorum of the board.

**A**CTION on the case to recover damages of the defendant bank for refusing to permit transfers to be made on their banks to the plaintiff of certain shares of the stock. The defense was, that under a by-law of the bank no stockholders of the bank could sell and transfer his stock while indebted to the bank, and that the stockholder in whose name the shares stood on the books of the bank, and from whom plaintiff claimed, was indebted to the bank when he made the sale. In several other cases considered at the same time the Supreme Court of Rhode Island held that such a

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by-law was valid (*Lockwood v. Merchants' National Bank*, 9 R. I 308); but the Supreme Court of the United States has since decided that in no way can a National bank restrain a transfer of its stock. *Bank v. Bullard*, ante, p. 93; therefore the decision of the Rhode Island court on that question is not included.

*Currey & Rogers*, for plaintiff.

*Bradley, Hart & Markland*, for defendants.

DURFEE, J. The defendants claim that the by-law in question was adopted by a quorum of the directors of the American National Bank on the two grounds: first, that there were only ten directors of the bank previous to its conversion; and, second, that the ten directors who executed the organization certificate and took the oath, became, under the United States law, the directors of the National bank, exclusively of any others.

1. The non-acting directors were elected with the other directors by the bank when a State bank. No subsequent qualification was required of them. They never signified their acceptance. The other directors never elected others to fill their places at the board. For any thing we can see, they might have acted as directors at any time before the conversion, if they had chosen. Where no qualification is required and there is no usage to control, we think a person who is elected a bank director may be presumed to accept unless he declines. This presumption may doubtless be rebutted, and perhaps simple non-action for five months would be sufficient to rebut it in some cases. But in this case the stockholders who authorized the conversion recognized the non-acting directors as directors at the time of the conversion. They name them, in the instrument authorizing the conversion, with the other ten as those "*who are now the directors of said American Bank.*" The instrument may be invalid in so far as it was intended to operate as a reappointment, but considered as a recognition of the status of the non-acting directors, it is none the less significant. We think we ought not to find for the benefit of the bank that there were only ten directors previous to its conversion because of the simple non-action of these two, when the stockholders authorizing the conversion recognized these two with the other ten at the time they authorized the same.



2. The National Currency Act, section 44, prescribes the mode in which State banks may become National banks. It provides that "in such case, the articles of association and the organization certificate required by this act may be executed by a *majority of the directors* of the bank or banking institution;" that "the certificate shall declare that the owners of two-thirds of the capital stock have authorized *the directors* to make such certificate," etc.; that "*a majority of the directors*, after executing said articles of association and organization certificate, shall have power to execute all other papers and to do whatever may be required to make its organization perfect and complete as a National association," etc., and that "*the directors aforesaid* may be the directors of the association until others are elected or appointed in accordance with the provisions of this act."

We think the words, "the directors aforesaid," mean those who are the directors of the State bank, the design being that the directors of the State bank should be the directors of the National bank until an election or appointment by the National bank. They are "the directors," a majority of whom are authorized by the section to do certain acts. This seems to us to be the natural construction, and we think of no good reason for not adopting it. We cannot suppose it was designed that the bank should lose the services of a director or of its president, merely because he did not sign the articles of association and the organization certificate; for the omission may have been owing to a temporary sickness or absence. If the intention had been that those only of the directors of the State bank, who executed the articles and certificate, should be directors of the National bank, the intention would, we think, as it very easily could, have been more unmistakably expressed.

We also think that no oath was, by the act, required of these *ad interim* directors. Section 9 provides that "each director, *when appointed or elected*, shall take an oath," etc. These directors were not elected or appointed for the interim, but held under the act by virtue of their former election. The 44th section says, "the directors aforesaid may be the directors of the association until others are elected or appointed in accordance with the provisions of this act." It adopts the directors of the State bank as the directors of the National bank for the time being. It makes no mention of any oath as being required of them, and it might happen that

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some of the directors thus adopted, not being owners of the amount of stock required by the act, could not take the prescribed oath. And see Comptroller's Instructions, issued in 1864, page 9.

But even if the oath be necessary, it does not follow that a majority of only those who take the oath would constitute a quorum of the National board. On the contrary, we think it would still require, to make up such a 'quorum, a majority of "the directors aforesaid," i. e., of those who were the directors of the bank before its conversion.

We consequently still feel constrained to adhere to our former opinion, that the twelve directors elected by the State bank became, by force of the National Currency Act, the directors of the National bank, and that, therefore, the by-law in question, being adopted by only six of them, was not adopted by a majority or quorum of the board, and so did not become a valid by-law. We therefore render

*Judgment for the plaintiffs.*

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## CHARLESTON V. PEOPLE'S NATIONAL BANK.

(5 South Carolina, 103.)

*National bank — Increase of capital stock — Taxation of increased stock.*

Where a National bank voted to increase its capital stock, and the requisite number of new shares were subscribed and paid for before the 1st of January, 1872, and a semi-annual dividend, declared as of that day, was paid upon the new shares, as well as the old, but such increase of capital was not approved by the Comptroller of the Currency, nor his certificate issued until the 5th of January, 1872. *Held*, that such new shares were not the subjects of taxation under an ordinance imposing a tax on bank shares "in the hands of the tax payers on the 1st of January, 1872."

There can be no increase of the capital of a National bank until the Comptroller of the Currency approves thereof and issues his certificate, as provided by section 13 of the act of Congress providing for the organization of National banks.

CASE agreed upon in a controversy submitted without action. The city council of Charleston claims to recover of the stockholders of the People's National Bank \$6,312.50.

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Charleston v. People's National Bank.

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The following are the facts upon which said controversy depends:

1. That the city council of Charleston is a municipal corporation under the laws of the State of South Carolina, "with power and authority to make such assessments on the inhabitants of Charleston, or those who hold taxable property within the same, for the safety, convenience, benefit and advantage of the said city as shall appear to them expedient."

2. That an ordinance to raise supplies for the year 1872, ratified on the        day of       , 1872, by said city council imposed a tax of two per cent upon the taxable property within said city, in the hands of tax payers, on the 1st of January, 1872.

3. That the People's National Bank, a banking association within the limits of the city of Charleston, organized under the laws of the United States, on the 12th day of February, 1872, returned seven thousand five hundred shares, valued at \$100 each, as in the hands of its stockholders, subject to taxation, upon which, after deducting value of real estate and city stock, at \$23,440, a tax of two per cent was duly assessed by the city appraiser, and the same has been duly paid by said bank for its stockholders, pursuant to section 28 of ordinance of February 10, 1870.

4. That, on the 1st day of July, A. D. 1871, said banking association voted to increase the number of shares of capital stock in said bank to one thousand, subject to the approval of the Comptroller of the Currency. Between the 1st of July, 1871, and the 1st of January, 1872, said two thousand five hundred additional shares were duly subscribed, and the amount thereof, \$250,000, secured to be paid to said banking association, and the securities were held by the cashier in trust for it. The said banking association declared and paid a semi-annual dividend upon all of its said stock, including said increase of two thousand five hundred shares, on the 7th day of January, A. D. 1872, for the half year ending January 1, 1872.

5. That the subscribers to said additional shares of stock did receive certificates of stock representing the same after the 2d of January, 1872.

6. That on the 15th day of June, A. D. 1872, said banking association having failed to return said additional shares for taxation to the city council, the city appraiser, pursuant to sections 29 and

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38 of the ordinance of the city, of February 10th, 1872, proceeded to list said two thousand five hundred shares of stock for taxation, and fixed the value thereof at \$100 per share, amounting in all to \$250,000, and levied pursuant to ordinance of city council, of the            day of           , A. D. 1872, a tax of two per cent thereon, which tax amounted to the sum of \$5,000, which, not having been paid at the times required by ordinance, is subject to a penalty of twenty per cent for non-payment, pursuant to section 48 of the ordinance of February 10th, 1872, amounting to \$1,000. There has been a school tax assessed by the Charleston city board of school commissioners, of three hundred and twelve dollars and fifty cents (\$312.50), to be collected by the city council of Charleston, and if said stock is taxable the same is now due to plaintiff.

7. The said banking association did not obtain leave of the United States Comptroller of Currency to increase its capital stock till after the 1st day of January, 1872; and the Comptroller of Currency refused to recognize any increase of the capital stock of the bank until the 5th day of January, 1872; and, the 3d day of January, 1872, said banking association returned to the Comptroller of Currency, at Washington, only seven thousand five hundred shares as the amount of its capital stock, subject to taxation by the general government, paid the tax thereon, and the said return and payment were accepted by the said Comptroller.

The question submitted to the court is: Had the city council a right to levy the tax on the two thousand five hundred shares of stock, under the facts stated?

The court below ordered that judgment be entered against the defendant in the sum of \$6,312.50, with costs, and that the plaintiff have execution thereof.

The defendant appealed.

*Simonton*, for appellant.

*Minot*, city attorney, *Corbin & Stone*, for respondent.

MOSES, C. J. The single question presented by the case agreed upon in a controversy submitted without action between these parties is, whether the city council of Charleston had a right to levy the tax on the twenty-five hundred shares of the stock referred to in the brief.

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It is not necessary to repeat the facts on which our judgment is to be pronounced, for they are recited in the agreement which precedes this opinion.

The ordinance of the city council imposed the tax "on the shares in the hands of its shareholders, respectively" (§ 22, p. 96, city ordinances, 1859-70), and if the shares upon which it is claimed the proposed tax is to operate can be comprehended within its terms, the judgment of the Circuit Court must be affirmed.

The institution in question was established and organized as one of the National banks, under the act of Congress of 3d June, 1865, "to provide a National currency secured," etc. (13 U. S. Statutes, 99). For its formation it was necessary that a certificate should be prepared and filed with the Comptroller of the Currency at Washington, which should contain, among other things, a specification of the amount of its capital stock, and the number of shares into which it was to be divided. This is the evidence of the amount of such capital stock and its distribution into shares, and these last are then fixed, designated and known at the bureau of currency by the record preserved in the proper office thereof. The act further provides by its 13th section, page 103, "for an increase of the capital from time to time, provided that the maximum of such increase shall be determined by the Comptroller of the Currency; and no increase shall be valid until the whole amount of such increase shall be paid in, and notice thereof transmitted to the Comptroller, and his certificate obtained, specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as a part of the capital of such association."

The argument, on the part of the respondent, proceeds upon the ground that the proposed increase of the capital by the said twenty-five hundred shares was effected by the subscription to that extent, and the acceptance of certain securities therefor, held by the cashier in trust for the association. If this is well founded, then the increase does not depend on a compliance with the conditions expressed in the act of Congress, but on arrangements which the shareholders, originally organized under it, may make with third persons, in the face of the very law to which they owe the existence of their association, and under which, it is to be assumed, they are at least to carry out the obligations which it imposes. The error is in the attempt to give force to these shares as valid

and properly constituted shares of the association, before the approval of the Comptroller, when, in point of fact, the increase of the capital depended upon it. The resolution on the 1st day of July, 1871, to increase the number of shares, by its very terms, made it dependent on such approval. Until obtained, the capital remained as originally fixed. The act of the stockholders to that end was no more than a proposition among themselves, the effect of which was subject to the assent of the higher authority designated by the act of Congress. A solution of the proposition may be tested by the inquiry, whether, if before the 7th January, 1872, any one of the so-called stockholders could have required the association to issue a certificate for the shares so agreed to be taken by him. Only one answer could be given to it, and that, it appears to us, would conclude the respondent from imposing the tax, which must be upon shares of the capital stock, which, before the 7th January, 1872, was limited to the amount originally allowed by the certificate of organization.

It is supposed that these additional shares are subject to the tax because the \$250,000 which they represent was actually paid before the 1st of January, 1872, and a semi-annual dividend declared and paid on them for the half year then ending. The ordinance in question "imposed the tax on taxable property within the said city in the hands of tax payers on 1st January, 1872."

The proposed increase of the capital was required by the act of Congress to be paid in as a precedent condition, on the performance of which the approval of the Comptroller depended. If he had withheld it, the very requisite which was necessary to make the money deposited the medium through which the certificates of the additional shares could of right be demanded, was wanting.

That the money thus subscribed remained in possession of the bank, and that those who had advanced it, received on 7th January, 1872, a dividend for the half year ending on the first day of the said month, in common with the original stockholders, cannot affect the question. The original stockholders could apply the profits of the bank at their own pleasure, and if those who were interested in restricting the application of the dividends to the original stock do not complain, their want of objection cannot convert what must be considered as mere proposals for stock into valid and legal shares. The tax is not on the dividend, but on the share. The view which the Comptroller of the Currency took of

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the liability of the said twenty-five hundred shares to the tax of the government is clear, from the fact that although the said banking association, on 3d January, 1872, returned to him, subject to taxation by the government, only seven thousand five hundred shares, he imposed no tax beyond them, and accepted the said return payment as a compliance with the law.

While we are in no way bound by his decision, it cannot prejudice our conclusion, that the public officer charged by Congress with the duty of estimating the capital of these associations, on which the United States tax was to be laid, on the same facts before him, with the knowledge of the further extension of the capital of this bank, did not exact any tax on the said twenty-five hundred shares.

The answer of the court is, that the city council of Charleston did not have the right to levy the tax on the twenty-five hundred shares under the facts stated.

The judgment of the Circuit Court is, therefore, reversed.

*Judgment reversed.*

## NATIONAL BANK OF CHATTANOOGA V. MAYOR.

(8 Heiskell, 814.)

*National banks not liable to privilege tax.*

National banks are not liable to a privilege tax imposed by city ordinance on occupations and business transactions although "banks and banking" are in terms included.

**A**PPEAL by complainant from the decree of the Chancery Court at Chattanooga, dismissing bill on demurrer, April Term, 1875. D. M. KEY, Ch.

*Wheeler & Marshall*, for complainants.

*G. A. Wood*, for defendants.

NICHOLSON, C. J., delivered the opinion of the court.

This bill is filed in this case to enjoin the enforcement of a distress warrant, issued by the corporate authorities of Chattanooga

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against the First National Bank, for failing to pay a tax of \$100, assessed by them on the privilege of banking. The bill was demurred to on several grounds, and the demurrer sustained and the bill dismissed. The National Bank has appealed.

The charter of the city of Chattanooga authorizes its municipal authorities to levy and collect taxes on all privileges taxable by the laws of the State. By section 46. of the act of 1873, chapter 118, it is enacted, "that the occupation and business transactions that shall be deemed privileges, and be taxed, and not pursued or done without license, are the following," and among others, "banks and banking." By this enactment, the occupation of banking is forbidden, except upon license issued, and then it becomes a privilege and subject to taxation. If under this act, banking is taxable as a privilege, by the State, then the corporation of Chattanooga had the power to levy the tax complained of.

We think it manifest that it was not the intention of the Legislature to subject the National banks to taxation for the exercise of the privilege. To constitute a privilege, the occupation or business transactions must be such, that the Legislature could forbid it to be pursued or done, and which could only be pursued or done, under a license issued by the authority of the State. The National banks are authorized to pursue their banking business by virtue of acts of Congress. As the Legislature has no power to prohibit the exercise of the privilege so conferred by Congress, it would seem clear that it was not in their contemplation to include National banks among the privileges to be taxed.

It follows that the corporate authorities of Chattanooga had no power to tax the First National Bank as a privilege, and that the distress warrant was illegally issued and is void.

The bank might have proceeded by *certiorari* and *supersedeas*, to have the warrant quashed, but it is well settled that the Chancery Court has jurisdiction, to declare void, judgments rendered without authority, and to enjoin process issued thereon.

The decree sustaining the demurrer is sound, and the cause remanded for answer and further proceedings. The costs of the court will be paid by the defendant.



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Wiley v. The First National Bank of Brattleboro.

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## WILEY v. THE FIRST NATIONAL BANK OF BRATTLEBORO.

(47 Vermont, 546.)

*National banks — Special deposits for safe-keeping.* •

The taking of special deposits, to keep merely for the accommodation of the depositor, is not within the authorized business of National banks; and the cashiers of such banks have no power to bind them on any express contract accompanying, or any implied contract arising out of, such taking. (*See note, p. 911.*)

**A**CTION on the case with a count in trover for certain United States bonds. Plea, the general issue.

The plaintiff's evidence tended to show that defendant was a National bank organized under the act of Congress of June, 1864, known as the "National Currency Act;" that in January, 1869, he delivered, at their banking-house in Brattleboro, to S. M. Waite, the cashier, United States bonds of the value of \$2,400, and received a written receipt therefor, as follows:

## "THE FIRST NATIONAL BANK OF BRATTLEBORO.

"BRATTLEBORO, VT., Jan. 8, 1869.

"Lucius L. Wiley has deposited in this bank twenty-four hundred dollars of 5-20s, 1867, for safe-keeping, as a special deposit. July 1, 1869  
Jan. 1, 1870  
July 1, 1870  
Jan. 1, 1871

"S. M. WAITE, C."

That at the several dates minuted on the margin of said paper, he called at said bank and said Waite paid him the interest on said bonds and entered said memoranda on the margin of the paper; that in August, 1871, he presented said receipt to said Waite at said bank, and demanded said bonds of him; that said Waite did not then, nor had he since, delivered said bonds to the plaintiff; that some time before said demand was made, said Waite informed him that said bonds had been stolen the June before. The defendant offered no evidence, and declined to go to the jury with any question of fact, but asked the court to hold as matter of law that under said act of Congress National banks could not be held liable for special deposits; that said Waite could only bind himself, and

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not the bank, by the contract set forth in said receipt. No other question was raised by defendant.

The court, *pro forma*, declined to hold as requested, but directed a verdict for the plaintiff; to which the defendant excepted.

*Field & Tyler and E. J. Phelps*, for defendant.

• *C. N. Davenport*, for plaintiff.

WHEELER, J. Although the plaintiff has in this action declared as for a tort, still, so far as the tort rests upon contract, the same rules are to govern that would if the contract itself had been declared upon; as was said concerning actions of tort founded on the contracts of infants, in *Towne v. Wiley*, 23 Vt. 355, and was held respecting the tort of a married woman resting on her contract, in *Woodward v. Barnes*, 46 Vt. 332. The assumption of the obligation that the law imposes upon a depositary to keep the deposit is, of itself, a contract, as is apparent from the nature of the transaction and from authority. Jones on Bailm., § 50. In this case there is no evidence of any actual conversion of the plaintiff's bonds to the use of the defendant bank. And in the evidence of some constructive conversion, which the demand and refusal might otherwise afford, what was said in connection with making the refusal is to be taken as a part of it, and altogether that does not show any refusal in denial of the plaintiff's right, but rather a want of power to deliver, and an excuse for it, which would be very doubtful if not insufficient evidence of a conversion if the demand had been made of the party who had become the depositary. 2 Greenl. Ev., § 644. And would be none whatever of a conversion by the bank, in this case, unless it had itself become the depositary. The transactions by which the plaintiff claims that the bank had become the depositary were wholly with the cashier, and their effect to charge the bank rests entirely upon his power in that direction. There is no controversy, and could not properly be any, but that if the taking of these bonds to keep, as they were taken by the cashier, was within the scope of the corporative business of the bank, then the bank did become the depositary of them, subject to the liabilities of that relation, and, if without, not. A bank is an institution for the custody, loaning, exchange, or issue of money, and for facilitating the transmission of funds by drafts

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or bills of exchange. Webster's Dict., Burrill's Law Dict., Bouvier's Law Dict., tit. Banks. In *Foster v. Essex Bank*, 17 Mass. 497, the bank was chartered by that name, with power to contract by it, and without other express powers, leaving the scope of its corporate business almost wholly to implication; but, according to the special verdict in the case, it had always been its practice to receive special deposits of money and other valuable things, with the knowledge of and without objection by its directors. An important question in the case, which was debated by as able counsel as any in the country, was as to the power of the president and cashier to bind the bank by taking a large amount of gold coin in kegs to keep, on the taking of which a memorandum of its weight and amount was made, to which the president appended a statement signed by him, but not by his official title, that the coin was weighed in his presence, and the cashier a statement signed by him as cashier, that it was left at the bank for safe-keeping. After much deliberation it was decided that, on account of that practice, and not because it was a part of legitimate banking business, the bank became charged with the liabilities of a depository of the coin. That case is much relied upon for the plaintiff in this case, and no other case, as to the scope of the powers of banks, of sufficient importance to attract the attention of counsel, appears to have arisen and been decided between that and the passage of the act of Congress in 1864, under which this bank was organized. In authorizing the formation of banks under that act, the framers of it must have had in view what the objects of banks were defined to be, what their powers were understood to be. And with those things in view, after providing how the banks might be organized and officered, make contracts, sue and defend, they enacted that the banks might exercise, under that act, "all such incidental powers as shall be necessary to carry on the business of banking by discounting and negotiating promissory notes, drafts, bills of exchange, and other evidences of debt; by receiving deposits; by buying and selling exchange, coin and bullion; by loaning money on personal security; by obtaining, issuing, and circulating notes according to the provisions of this act." Deposits in banks had then long been well understood to mean the placing of money in banks to the credit of the depositors, to be used by the banks as their own, and be drawn against by, or paid to the depositors at their pleasure, and not the delivery of either money, securities or

other property, to be specifically kept and redelivered. These latter had been equally well known as special deposits. Story on Bailm., § 88; *Foster v. Essex Bank*, 17 Mass. 497. The receiving of such special deposits is not in any sense necessary to carrying on the business of banking. If made of money, even, no use could be made of it whatever; nor could any profit be derived from it, unless charge should be made for the custody; and then that business would be more like that of a warehouseman than that of a banker. The receiving of such general deposits is a part of ordinary banking business, and power to receive them is necessary to carrying on that part, and useful to carrying on others; and when Congress granted to the banks the incidental powers necessary to carry on the business of banking by receiving deposits, the kind of deposits that the settled meaning of the term, used in such connection, would apply to, and the kind that would answer the description as to being necessary, must have been intended. The express grant of the powers mentioned is, on familiar principles, an implied exclusion of all not mentioned. It has been urged with plausibility for the plaintiff, that the mention of special deposits in section 46 of the act, shows that such were meant to be included among those that the banks, by section 8, are authorized to receive. But the provisions of section 46 are made solely with reference to winding up the affairs of banks after their business has been stopped, and not at all with reference to the prosecution of it; and this part of the section has especial reference to restricting, and not any to enlarging their powers. And then banks that would have deposits as security for loans might have their business stopped; and, if so, under the provision that they should not prosecute business except to receive and keep their money, they might be embarrassed about such special deposits, on payment of the debts, without such a provision as that in section 46 authorizing the delivery of them. But whatever else may have been the purpose of inserting that clause there, it seems plain that it was not intended to add to powers that had been so categorically set forth in another separate section as to indicate that all were intended to be named there. This act of Congress, besides authorizing the formation of banks, provided a mode for organizing them by the shareholders signing a certificate stating the name, place, and amount of stock of the bank, the number of shares to each stockholder, and a declaration that the certificate was made to enable

them to avail themselves of the advantages of that act. In the absence of any showing, it is presumed from the concession that this is a National bank organized under that act, that it was organized in that mode. And in organizing in that way, the shareholders would have a right to and would understand that they were engaging in no business except that which the act authorized; and that their officers chosen by them under the act would have no authority to enter into any business other than that, to bind them; and to allow the officers to jeopardize their interests by engaging in other business to the advantage of other persons, would allow the officers to perpetrate a fraud on the shareholders for the benefit of others.

It is insisted for the plaintiff, that the cashier, by taking the bonds and delivering the written certificate that they were deposited in the bank for safe-keeping, bound the bank to keep them safely, and that it has thereby become responsible for them. But, although Lord COKE in his report of *Southcote's case*, 4 Rep. 83, and in his commentary on Littleton, 1 Inst. 89, *a*, *b*, considered that a bailment to keep merely, and one to keep safely, were of the same obligation; other reports of that case do not seem to warrant his conclusion from it. *Southcote v. Bennett*, Cro. Eliz. 815. And it appears to be now well settled, that there is a substantial difference between the two undertakings. *Coggs v. Bernard*, 2 Ld. Raym. 911; Jones on Bailm. 43; Story on Bailm., § 72. In *Foster v. Essex Bank*, it was expressly decided that neither the cashier nor the president of the bank, even when it had followed the practice of taking special deposits, could bind it by an express promise to keep the coin deposited safely, because such a promise would be outside the practice of taking to keep merely. And clearly on the authority of that case, the cashier in this case could not bind this bank by an express promise to keep the plaintiff's bonds safely. And the undertaking to keep, implied from the mere acceptance of a deposit, is as far outside the authorized business of this bank, as that express undertaking was outside the practice of that one. This case does not show that the cashier placed these bonds in the vault, or with the property of the bank at all; but doubtless the plaintiff expected he would and he did put them into the vault of the bank. But if he did, he did not do it as the agent of the shareholders of the bank in their corporate capacity, for he had not been made agent for that purpose. If he had himself become

the depository, and put them there because he considered that to be a safe place for him to keep them in, then the bank is no more liable for them than it would be for bonds of his own if he should put them there, for the same reason. If he was the plaintiff's agent in the putting them there, they were there at the plaintiff's risk, as much as they would have been if the plaintiff had himself, with leave of the person in charge, placed them there. In neither case would the bank be any more liable than a merchant would be if the plaintiff should get his clerk to lock bonds of the plaintiff in his safe; or than a town would be if he should get the town clerk to lock his bonds into the safe used to keep the town records in. The cashier had no authority to bind the bank by any contract for the custody of the bonds and the mere fact, if it was the fact, that they got into the vault of the bank, would not charge the bank with their custody. National banks have uses for government bonds, and might in various ways, probably, convert them to their use, and should they do so, they would unquestionably be liable for the tort, as natural or other artificial persons would; but as this case now stands, no such cause of action appears.

*Foster v. Essex Bank* is the only one of the cases cited in argument, or that has been observed, that has involved any question enough like the leading one in this case, to afford any direct guide for its decision; and there is this difference between that case and this, that in that case the charter did not proceed to express what powers the bank should have to make contracts and to do business, while in this, the act under which this bank is organized does expressly set forth what powers the bank should have, and does not include power to take special deposits among them. This case would have been like that as to powers of the banks, if the act of Congress, after authorizing the formation of the banks with powers to contract, sue and be sued, had stopped there, without setting forth any thing about the business as to which they might contract. As it is, the case has had to be decided more upon the construction of the act of Congress, considered with reference to settled principles that stand about the subject, than upon decided cases. And upon that act, so considered, it is determined here that the taking such special deposits to keep, merely for the accommodation of the depositor, is not within the authorized business of such banks, and that their cashiers have no power to bind them to any liability on any express contract accompanying, or any implied con-

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tract arising out of, such taking. And this conclusion cannot work any injustice or hardship to the plaintiff, for he dealt with the cashier because he chose to, not because he was obliged to; and if the cashier in the dealings assumed to have any power he did not have, the plaintiff trusted him in that respect, and has his responsibility to rely upon to vindicate the assumption. And if the cashier incurred any liability as for himself, the plaintiff likewise trusted him about that, and has the same responsibility of the cashier to look to for it.

*Judgment reversed and cause remanded.*

**NOTE.**—The doctrine of this case was approved by ALLEN, J., who delivered the opinion of the Court of Appeals in *First Nat. Bank v. Ocean Nat. Bank*, ante, 128, and by the Court of Appeals of Maryland in the two cases below cited, but in neither case was the question of the power of National banks to receive deposits for safe-keeping before the court. The Supreme Court of Pennsylvania does not, however, accept the opinion in the principal case.

In *Chattahoochee Nat. Bank v. Schley*, ante, 379, the Supreme Court of Georgia remarked that a National bank which habitually receives special deposits for safe-keeping, as matter of accommodation, is bound by the act of the cashier in receiving such deposits and liable for a loss thereof occasioned by its gross negligence. The question was not, however, before the court. In *First Nat. Bank v. Ocean Nat. Bank*, ante, 728, the Court of Appeals of New York held that in the absence of special authority from the directors, or of usage so to do, the cashier of a National bank has no power to receive special deposits for safe-keeping; and the judge writing the opinion expressed his concurrence with the views of the foregoing case of *Wiley v. First Nat. Bank*, but only two judges "concurred" in the opinion, the others concurring in the "result." The action was against the bank to recover bonds deposited with it for safe-keeping, and which were stolen by burglars. Judgment was rendered for the plaintiff, which was affirmed by the General Term of the Common Pleas. This judgment the Court of Appeals reversed, but as the majority concurred only in the "result," it is impossible to say whether the reversal was because it was not shown that the defendants were grossly negligent, or because the cashier had no authority to take the deposit and bind the bank.

Both the case of *Wiley v. First National Bank*, and *First National Bank v. Ocean National Bank*, were approved in *Third National Bank v. Boyd*, ante, 545, but the point was not in issue there. In that case the bank had taken bonds as collateral security for a debt and they were stolen while yet in the possession of the bank although after the debt was paid. The court held that the bank was not a gratuitous bailee and that it was liable if it had failed to exercise ordinary care. See, also, *Weckler v. First National Bank*, ante, p. 553; and *Second National Bank v. Ocean National Bank*, 11 Blatchf. 362.

In *Lancaster National Bank v. Smith*, 62 Penn. St. 48; and *Scott v. National Bank of Chester Valley*, 72 Penn. St. 471 (ante, p. 864) the Supreme Court of Pennsylvania passed upon the liability of National banks for deposits for safe-keeping, but in neither case was the question raised as to the power of such banks to take such deposits. These cases turned on the question of negligence. In *First National Bank v. Graham*, 79 Penn. St. 106 (ante, p. 875) the same court held that while the mere voluntary act of the cashier of a National bank in receiving special deposits for safe-keeping would not subject the bank to liability, yet if the deposit was known to the directors and its retention acquiesced in by them, or if there was a custom for the bank to receive such deposits, the bank would be bound. This decision is in accordance with *Foster v. Essex Bank*, 17 Mass. 479, which is the leading case on the subject.

In *De Haven v. Kensington National Bank*, 81 Penn. St. 95 (ante, p. 882), it was held that whether or not National banks have the power to take special deposits for safe-keeping they are not liable for a loss of them unless they have been guilty of gross negligence. See,

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also, *Leach v. Hall*, ante, p. 466; *First National Bank v. Pierson*, ante, p. 637.

In *Smith v. First National Bank*, 99 Mass. 605, the action was to recover the value of a special deposit for safe-keeping, but the question of the power of National banks to take such deposits was not raised. The court held the defendants liable only for want of ordinary care. This rule of liability is sustained by the decisions. *Ray v. RER*

*Bank of Kentucky*, 10 Bush, 344; *Dearborn v. Union National Bank*, 58 Me. 273; S. C., 61 id. 369, and cases cited in *Scott v. National Bank*, ante; *First National Bank v. Graham*, ante. A bank is bound to take only ordinary care of bonds pledged with it, as collateral security. *Jenkins v. National Village Bank*, 58 Me. 275; *Dearborn v. Union National Bank*, 61 id. 369.—

## FIRST NATIONAL BANK OF MONTPELIER V. HUBBARD AND OTHERS.

(49 Vermont, 1.)

*Jurisdiction of State courts of suits brought by National banks.*

State courts have jurisdiction of suits brought by National banks, it not having been taken away by section 57 of the National Banking Act.\*

ASSUMPSIT upon a promissory note. At the September Term, 1875, the defendant Hubbard moved to dismiss the action, for that National banks could not maintain actions in the State courts, and that the United States courts alone had jurisdiction of such actions. The other defendants were defaulted. Motion overruled and judgment for plaintiff. Exceptions by Hubbard.

*J. A. Wing*, for defendant, cited Stats. U. S. 1863-4, No. 85, § 57; *The Bank of Bethel v. The Pahquioque Bank*, 14 Wall. 333; *Kennedy v. Gibson et al.*, 8 id. 498.

*Gleason & Field*, for plaintiff.

ROYCE, J. In the County Court the defendant Hubbard moved the court to dismiss the action on the ground that National banks cannot maintain actions in the State courts, and that the United States courts alone have jurisdiction of such actions. The court

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\* See *Claffin v. Houseman*, 93 U. S. 130, wherein the analogous question of the jurisdiction of State courts of actions by an assignee in bankruptcy is discussed at great length and with great learning. The court held that where the Federal courts are not expressly given exclusive jurisdiction, the State courts may be resorted to to enforce rights arising under Federal Statutes. See, also, *Ordway v. Central National Bank*, ante, p. 559, and cases there referred to.—RER.



overruled the motion, and the only question presented is as to the correctness of that ruling.

The plaintiff is a banking association, established under the act of Congress of 1864, entitled "An act to provide a National currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof." The 8th section of that act declares that every banking association formed and organized pursuant to its provisions shall be a body corporate, with the usual powers of a corporation; may have a corporate name and seal; may make contracts, and sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons. In the absence of any restrictive legislation upon the subject, a corporation established under that act would have the right to maintain a suit in its corporate name in any State court of appropriate jurisdiction; for it is well settled, that civil cases arising under the Constitution and laws of the United States may be tried and determined in the State courts, unless the National Constitution and laws have vested exclusive jurisdiction of them in the Federal courts, but that Congress may prohibit the State courts from entertaining jurisdiction of such cases. 1 Kent's Com. 396; *Bank of the United States v. Devereaux*, 5 Cranch, 85; *Osborn v. United States Bank*, 9 Wheat. 738; *Teale v. Felton*, 1 Comst. 537; *Ward v. Jenkins*, 10 Metc. 591; *Cooke v. The State National Bank of Boston* 52 N. Y. 96 (*ante*, p. 698).

It is claimed that exclusive jurisdiction of all suits instituted by any such corporation is given to the district and circuit courts by section 59 of the act of Feb. 25, 1863, and the 57th section of the act of 1864. Section 59 of the act of 1863 provided that all suits, actions, and proceedings *by* or *against* any association under the act, may be had in any circuit, district, or territorial court of the United States held within the district in which such association may be established. The 57th section of the act of 1864 provides that suits, actions, and proceedings *against* any such association may be had in the same courts, or in any State, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases.

In *Kennedy v. Gibson et als.*, 8 Wall. 498 (*ante*, p. 17) which went by appeal from the Circuit Court to the Supreme Court of the United States, and was heard on demurrer to the petition, one question that arose was, whether, in view of the omission in the 57th section of the

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act of 1864 (literally read) of the word *by*, the bill could be sustained in the court where brought. In the opinion delivered by Justice SWAYNE, he says, "The 59th section of the act of Feb. 25, 1863, provides that all suits *by* or *against* such association may be brought in the proper courts of the United States. The 57th section of the act of 1864 relates to the same subject, and revives and enlarges the provisions of the 59th section of the preceding act. In the latter, the word *by*, in respect to such suits, is dropped. The omission was doubtless accidental. It is not to be supposed that Congress intended to exclude the association from suing in the courts where they can be sued. If this be not the proper construction, while there is provision for suits against the associations, there is none for suits *by* them in any court." This construction would give the plaintiff the right to sue in either of the courts designated in the 57th section of the act of 1864, not upon the ground that the right to sue in the State courts was given by the act of Congress, because it was held in *Houston v. Moore*, 5 Wheat. 1, that Congress cannot confer jurisdiction upon any courts but such as exist under the Constitution and laws of the United States, but upon the ground that State courts may exercise jurisdiction in cases authorized by the laws of the State, and not prohibited by the exclusive jurisdiction of the Federal courts. I think the proper construction to be put upon section 57 of the act of 1864, in regard to the power conferred of bringing actions in specified courts, is permissive and not mandatory.

There are no words of exclusion in the act; and it is a general rule as to jurisdiction, that to confer it upon one court does not operate to oust other courts otherwise possessing it, for the reason that concurrent jurisdiction is not inconsistent. *Delafield v. State of Illinois*, 2 Hill, 160. At all events, the jurisdiction of State courts should not be taken away upon doubtful or ambiguous language.

*Judgment affirmed.*

## FIRST NATIONAL BANK V. MERCHANTS' NATIONAL BANK.

(7 West Virginia, 544.)

*Acceptance of checks by National bank.*

The act of Congress of 3d March, 1869 (R. S., § 5208) making it unlawful for National banks to certify checks unless the drawer has at the time an amount of funds on deposit equal to the amount specified in the check, does not invalidate an oral acceptance of a check or promise to pay a check, there being at the time sufficient funds of the drawer in possession to meet it.

A check drawn on a National bank was presented for acceptance, whereupon the bank promised to pay it as soon as it received information that a certain draft left with it for collection was paid. The draft was paid and the bank informed. *Held*, that the acceptance was good and binding on the bank.

**W**RIT of error and *supersedeas* granted on the petition of the First National Bank of Wheeling to reverse a judgment of the Circuit Court of Ohio county, and award a new trial, in a suit therein pending, wherein the Merchants' National Bank of Wheeling was plaintiff, and said First National Bank of Wheeling defendant.

So many of the facts as are deemed material appear in the opinion of the court.

The Hon. JOHN BLAIR HOGE, judge of the Third Judicial Circuit, presided at the trial below.

*C. W. B. Allison*, for appellant.

*Daniel Lamb*, for appellees.

PAULL, J. This was an action of assumpsit brought by the plaintiff, on a check of which the following is a copy:

" WHEELING, W. VA., 24th Feby., 1871.

" First National Bank of Wheeling:

" Pay to S. Brady, Esq., Cas., or bearer, fifteen hundred dollars.

\$1500.

" A. C. QUARRIER, *Treas.*"

There are two special counts in the declaration; the *first* setting

forth the drawing of the check, and its presentation to and acceptance by the defendant, in consideration whereof the defendant undertook and promised to pay the plaintiff the amount thereof.

The *second* special count recites the making of the check; that the same was presented to defendant for acceptance, and that defendant promised to pay said check, as soon as it received information that a certain draft, of the Savings Institution of Wheeling, of which it was proved the said Quarrier was treasurer, upon — of Alleghany county, Pennsylvania, had been paid, which last-mentioned draft had been placed in its hands for collection; that defendant received information that said draft so left with it for collection had been paid, and the amount of, exceeding \$1,500, was in fact paid to defendant, whereby it became liable to pay to the plaintiff the said sum of \$1,500. The declaration also contains the usual common counts. With the declaration an account was filed for the amount of said check, which, not being paid, was duly protested.

The plaintiff demurred to the second special count in the declaration, in which there was a joinder by the defendant; and also filed the plea of non-assumpsit. No action seems to have been had upon the demurrer, by the Circuit Court, but as there is no exception or complaint disclosed by the parties on that account, we do not propose to take any notice of that fact.

At the May term of the Circuit Court, 1873, a jury was empaneled to try the issue, and rendered a verdict in favor of the plaintiff for \$1,705. A motion for a new trial was made by the defendant, for the reasons assigned in the record, and for the matters set forth in defendant's bills of exception; this motion was overruled by the court, and judgment entered on the verdict; and from this action and judgment of the court an appeal is now taken.

We now proceed to notice the grounds of the appeal, so far as it may seem proper or material for a right decision of the cause.

[The court here decided a question of evidence.]

The next ground of exception taken by the defendant is to the instruction given by the court to the jury, at the instance of the plaintiff.

As we understand the evidence, that instruction, taking the first part in connection with the modification thereof, as given by the court, and designed as an independent instruction, is irrelevant to the issue before the jury, and should have been refused. It was to

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the following effect, that if the jury find that the acceptance of the check, if any, made by the defendant, was conditional, and that such acceptance was withdrawn or countermanded, at such time, and in accordance with such usages between the parties, as that checks, which had been accepted and paid by either party, could be returned, or the acceptance countermanded, and as a consequence, as we interpret the instruction, that no loss or damage could result from such withdrawal, the jury should find for the plaintiff. With this understanding of the effect of the instruction, we do not think it was erroneous.

The *third* exception of the defendant is to the rejection by the court of the *three* instructions asked for, on its behalf, and which involve an application of the act of Congress, of March 3, 1869, in reference to certified checks. The act is very brief, and simply makes it unlawful for any officer of a bank to certify a check, unless the drawer has funds on deposit, at the time, equal to the amount specified in such check; and after declaring such check good, affixes a penalty for the violation of the act, subjecting the bank to the action of the government. With this act in view the defendant asks the court to instruct the jury, *first*, that in order to maintain the plaintiff's action, the jury must find, from the evidence, that the check sued upon was accepted, or certified, in writing. The instruction was refused, and we think properly. Can it be successfully maintained, and should it be established as a fixed principle, that because a statute prohibits (to give it the greatest effect that can be claimed by defendant) a bank from certifying a check, when the drawee has not in its possession an amount of funds equal to the amount specified in the check, that, therefore, a verbal acceptance or promise made, on its behalf, by a proper officer, to pay a check, when the drawer has an amount of funds in possession of the bank, sufficient for the purpose, is null and void, and cannot be enforced? We assume here, without argument, that it is sufficiently established, by both English and American authorities, that the conditional acceptance of a check, as also the oral acceptance of a check, or the oral promise to pay a check, are valid, and can be maintained. Because the bank must not in writing certify a check, when there are no funds of the drawer in its possession, therefore it shall not verbally agree to pay a check when there are funds in possession sufficient for the purpose; for this, at least, is implied in such an argument. This

would seem to be giving a strained and improper effect to the act of Congress.

The *second* instruction asked for involves the same mode or principle of construction. It recites that if the jury find that the check sued on, and given in evidence by the plaintiff, was taken by the plaintiff from the defendant, with the understanding that there was then no money of the drawer of the check on deposit in defendant's bank to pay the same, and that it was to be paid out of the proceeds of a claim of the drawer in the hands of the defendant at Pittsburgh, and not yet collected or matured, and that the acceptance by the defendant, if any was made, was conditional upon the future collection or payment of such claim, then the plaintiff is not entitled to recover in this action. We think this instruction was properly refused. Because the act of Congress prohibits a bank from certifying a check when the drawer has no funds, why should that invalidate a promise on its part to pay a check when the drawer shall have funds for the purpose in its possession? This is but acting in accordance with the spirit of the act itself, refraining from making any promise which is operative until the bank is in the condition contemplated by the act. It is not seen how any interests of the bank are endangered by pursuing this course. Indeed, such a promise seems to be implied in the very existence of the bank, and the nature of the business it transacts. It says to the public and customers by the very laws of its being, I will pay all checks drawn upon sufficient funds of the drawer in my possession, and such is its legal and moral obligation.

The *third* instruction involves the liability of the bank on an accepted or certified check, when the drawer had not funds in its possession equal to the amount specified in the check. We think this question does not arise upon the record. It does not present a state of facts to which the instruction can be applied. The claim of the plaintiff rests wholly, so far as the evidence indicates, upon a conditional acceptance, if there was any acceptance whatever, giving the plaintiff the benefit of the evidence in its strongest form, as stated by its principal witness, and it proves that the check was accepted to be paid only when the Pittsburgh draft should have been paid, and the defendant had no offsets. There is, therefore, no absolute certified or accepted check given when there were no funds sufficient to meet it in the hands of the bank presented for our consideration in this controversy, and it will be

better, perhaps, to postpone a decision upon the validity of such a check until the question is fairly presented.

The *fourth* instruction recites, if the jury find that the defendant did not accept the draft sued upon and given in evidence by the plaintiff, either unconditionally or upon the single condition alleged in the declaration of the plaintiff, but did accept the same with conditions other (or additional) than as set out in the declaration, the plaintiff cannot recover in this action. It is certainly true, that if the plaintiff proves another and substantially different contract than that upon which he declares, as a general rule the variance will be fatal. This seems to be the effect of the instruction in question, and to it there seems no valid objection.

The only question remaining to be determined arises on the motion for a new trial, and which was overruled by the court. The grounds for this motion, as they stand connected with the instructions given or refused by the court, have been already considered. The only remaining ground is connected with the evidence. The verdict is claimed to be against the evidence.

How far an appellate court will interfere in a question of this kind may depend very much upon the frame of the bill of exceptions to the decision of the court below for a new trial. In the case of *Bennett v. Hardaway*, 6 Munf. 125, the court expressed its views as to the proper frame of such a bill, and declares that it should not state all the evidence given to the jury on the trial, but only the facts appearing to the court to have been proved by the evidence. It was not regarded as competent for the appellate court to review and reverse the opinion of the court below, on a question touching the weight of the evidence and credit of the witness, and that if this were otherwise, it would have to do so "in the dark, or at least with lights inferior to those possessed by that court." But when the facts only are stated, it is competent for the appellate court to review and reverse the opinion of the court below founded on those facts; by doing which it does not depart from or overrule the decision of the latter court, as to the weight of testimony, or the credit due to any witness, nor bring the whole matter again into controversy. See Judge BALDWIN'S opinion in *Patterson v. Ford*, 2 Gratt. 18, where the case of *Bennett v. Hardaway* is reviewed and sustained, and which has been recognized in all subsequent cases. He further says that a bill of exceptions is not properly taken, unless strictly confined to the facts

proved by the evidence; for if any opening is left, by the introduction into it of evidence, as contradistinguished from the facts, the supposition that the cause may have turned before the jury upon the credit and weight of the evidence, and so have furnished room for the discretion of the court, the appellate forum will not interfere with what may have been an exercise of that discretion. To do so would, he apprehends, much impair the value of jury trials.

Upon examining the bill of exceptions in the case before us, we find that it is of a mixed character; it certifies facts which were proved, and also certifies the evidence of the chief witnesses, as taken down, apparently, at the time of the trial, and which is spread out in the record. The jury passed upon the whole of the evidence, some of which is conflicting, as connected with the origin, at least, of this transaction. While citing these authorities, however, as to what has been heretofore regarded as the form and effect of bills of exception, the rule applicable to the case, as the evidence appears in the bill of exceptions now before us, will be found in the case of *Carrington v. Goddin*, 13 Gratt. 587, where it was held, on a bill of exceptions to the refusal of the court to grant a new trial, because the verdict was contrary to the evidence, the evidence, and not the facts proved, is stated; the court will reject all the parol evidence of the exceptor, and give full faith and credit to all the evidence of his adversary; and will not reverse the judgment, unless it then appears to be wrong. In applying this rule, it will only be necessary to refer to a single particular. The plaintiff's right to recover depended upon satisfactory proof of the payment of the Pittsburgh draft. The acceptance and payment of the check sued upon was made conditional upon this fact, and it must, therefore, be fully established by competent testimony.

We find little or no testimony in the record tending to establish this indispensable fact, but the telegraphic dispatch purporting to have been sent by J. D. Scully, of the Pittsburgh bank. But, as we have heretofore seen, this testimony is incompetent, and its introduction erroneous. Excluding this testimony, and there is no proper or stable foundation, on which the verdict of the jury can rest. It then appears to be wrong, and the judgment founded upon it erroneous.

It was error, therefore, in the Circuit Court to refuse to grant the motion for a new trial, and the judgment rendered on the 2d day of June, 1873, is reversed, and the verdict set aside, with costs to



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the appellant, and this case is remanded to the Circuit Court of Ohio county for a new trial to be had therein, in accordance with the principles herein set forth.

The other judges concurred.

*Judgment reversed and cause remanded.*

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SIMMONS V. ALDRICH.

(41 Wisconsin, 240.)

*Lien of tax upon shares — Damages for sale of shares falsely represented to be free from such lien.*

The statute of Wisconsin made taxes assessed on shares of stock in National banks a lien on such stock. The defendant sold to plaintiff shares of stock in a National bank upon which was an unpaid tax. Defendant gave plaintiff a written statement purporting to contain all facts affecting the value of the stock, but in which the tax was not mentioned. The tax was paid by the bank. *Held*, that plaintiff could recover damages of the defendant to the amount of the tax.

**A** PPEAL from the Circuit Court for Kenosha county.

In 1871 the plaintiff purchased of the defendant a large amount of the stock of the First National Bank of Kenosha. Before making such purchase, he required the defendant to furnish a statement of every thing affecting the value of such stock; and the latter delivered to him a writing or schedule purporting to be such a statement, but no reference was made therein to the fact, of which the plaintiff was ignorant, that the taxes on such stock for the years 1865 and 1866, imposed under and by virtue of chapter 400, Laws of 1865, had never been paid.

The plaintiff subsequently paid such taxes, or, what is the same thing, they were paid by the bank, pursuant to chapter 23, Laws of 1872, to the amount of \$753.

This action was brought to recover damages for the alleged fraudulent concealment by the defendant of the fact that the taxes were unpaid. The cause was tried by the court without a jury, and afterward the judge filed his findings of fact as follows :

"1st. That the First National Bank of Kenosha is, and at all the times named in the complaint was, a corporation duly organized, existing and doing business in the city of Kenosha, under and by virtue of the act of Congress, in manner and form as set forth in the complaint herein."

(The complaint avers that the bank was organized March 8, 1864, under the act of Congress. It was stated on the argument, and not denied, that there is a clerical error in the date, which should be 1865 instead of 1864. Such is doubtless the fact.)

"2d. That on or about the 23d day of January, 1871, the defendant offered to sell, and did sell, to the plaintiff two hundred and fifty-one shares of the capital stock of said bank, representing a par value of one hundred dollars per share, at and for the sum of twenty-two thousand dollars.

"3d. That prior to said sale, and as one of the inducements thereto, at the special instance and request of the plaintiff, the defendant caused to be prepared a schedule purporting to show the assets and liabilities of the said bank, the condition and value of said assets, the amount of taxes unpaid upon said stock, and all other facts having a bearing upon the value of such stock.

"4th. That the defendant, prior to said sale, did represent to the plaintiff that the said schedule contained and comprehended all the facts affecting the value of the said stock, known to the defendant.

"5th. That the plaintiff relied upon such statements and representations of the defendant, in making said purchase of stock.

"6th. That at the time of said sale, the State taxes for the years 1865 and 1866 upon said stock had not been paid, and said stock was subject to the lien of such unpaid taxes for said two years, being one and one-half per cent on the par value of said stock for each of said years.

"7th. That in the year 1867, by virtue of the statute in such case made and provided, and by virtue of the directions of the State treasurer of the State of Wisconsin, the treasurer of the city of Kenosha did spread out upon the tax roll of that city for the year 1867, then in his hands as such treasurer, the names of the defendant and the other stockholders in said bank, the par value of the shares owned by each of them, together with the amount of tax due thereon for the years 1865 and 1866, being one and one-half per cent on the par value of such shares for each of said years;

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and that the entire amount of the capital stock of said bank, to wit, \$50,000, was so entered upon said tax roll as subject to said delinquent taxes for said years 1865 and 1866.

"8th. That during said year 1867, and while the said tax roll was in the hands of said collector, he (said treasurer of the city of Kenosha) made personal demand upon the defendant for the payment of said delinquent taxes upon said shares of stock then owned by the defendant, which payment was refused.

"9th. That during the year 1867 the defendant was elected president of said bank, and so remained until about the 23d day of January, 1871; and that prior to the time of his election as president, said defendant had been a director in said bank.

"10th. That at the time of said sale, the defendant well knew of the existence of said taxes for the years 1865 and 1866, and the amount of the same, and that they had not been paid, and were liens upon said stock.

"11th. That at the time of said sale, and for some time thereafter, the plaintiff was entirely ignorant of the existence of said unpaid taxes.

"12th. That said schedule so prepared by the direction of the defendant did not contain any mention of said unpaid taxes, or any part or portion thereof, nor did the defendant in any way make known to the plaintiff, before said sale, the existence of said unpaid taxes.

"13th. That on or about the 15th day of March, 1872, pursuant to chapter 23 of the general laws of the year 1872, the said delinquent taxes for the said years 1865 and 1866, upon the whole capital stock of said bank, to wit, one and one-half per cent upon the par value of said stock for each of said years, were duly paid to the treasurer of the State of Wisconsin by the said National bank, to wit, the sum of \$1,500; and that the plaintiff owned the said two hundred and fifty-one shares of said stock at the time of such payment.

"14th. That the said two hundred and fifty-one shares of said stock were at the time of said sale worth \$753 less than represented by the defendant, by reason of the existence and non-payment of said taxes for said years 1865 and 1866."

And as conclusion of law from these facts, the court held, "that the plaintiff is entitled to recover of the defendant the sum of \$753, with interest thereon from the 15th day of March, 1872, as well as the costs of this action."

The averments of the complaint correspond substantially with the findings of fact.

Judgment for the plaintiff was entered pursuant to the conclusion of law above stated ; and the defendant appealed therefrom.

*Winson & Winson*, for appellant.

*J. V. Quarles*, for respondent.

LYON, J. We are satisfied that there was no error in the rulings of the court upon objections to the admission of testimony, or, at least, none which could possibly prejudice the defendant, and that the findings of fact are sustained by the evidence.

The act of 1865, chapter 400, which imposed the taxes in question, is a valid law. It was so held by this court in *Van Slyke v. The State*, 23 Wis. 655, and in *Bagnall v. The State*, 25 id. 112 ; and this ruling has been affirmed by the Supreme Court of the United States. That law makes the taxes which it imposes a lien upon the shares of stock taxed (§ 2); and we are not aware of any subsequent legislation which removed such lien.

Hence, when the plaintiff purchased the stock, it was subject to a lien for the unpaid taxes, and remained subject thereto until they were paid pursuant to chapter 23, Laws of 1872. It requires but little evidence to prove that the stock was lessened in value by the non-payment of the taxes, in an amount equal to the taxes. And, the taxes having been lawfully imposed, there can be no doubt that the plaintiff or the bank might pay them at any time, if payment thereof was necessary to the maintenance of this action.

Legislation on the subject since 1865 for the purpose of enforcing payment of the taxes imposed by the law of 1865, is of no importance in the case. It is quite immaterial whether such legislation was or was not effectual to accomplish the intended purpose. If not effectual for such purpose, the controlling facts still remain, that when the plaintiff purchased the stock it was subject to the lien for the taxes, and that such taxes were paid pursuant to law.

*Peters v. Myers*, 22 Wis. 602, illustrated these views, and is a stronger case for the plaintiff. The point there decided is correctly stated in a head-note as follows : " Land conveyed in 1861, with covenant against incumbrances, was subsequently sold for taxes of 1857, reassessed in 1862 under an act of the Legislature of that year, the original assessment being invalid. *Held*, that there

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was a breach of the covenant, the lien of the tax relating back to the time when the land was entered on the assessment roll, and the aggregate amount of taxes for the year 1857 determined."

It appearing, therefore, that the defendant, when he sold the stock, concealed a fact, known by him and not known by the defendant, which rendered the value of the stock less than it otherwise would have been, and that the difference equals the judgment, it necessarily follows that the plaintiff is entitled to the judgment he has recovered.

By the court.

*Judgment affirmed.*

## MERCHANTS' NATIONAL BANK OF TOLEDO V. CUMMING.

*Taxation of shares — Unjust discrimination — Restraining collection of tax at suit of bank.*

The shares of stock of a National bank were taxed at their full value, while other property was assessed at from thirty to forty per cent of its real value. *Held*, that the discrimination was illegal and unjust, and that the bank was a proper party to maintain a bill to restrain the collection of the tax beyond the proportion assessed on other property.

(Circuit Court, Sixth Circuit.)

ACTION by the Merchants' National Bank of Toledo against Cumming, collector of taxes, to restrain him from collecting a tax assessed for the year 1876 on the shares of stock of plaintiff's bank. The late Judge EMMONS of the same circuit, before his death, granted a preliminary injunction.

*Judge Ranney and Wager Swayne*, of Toledo, for plaintiffs.

*Judge Griswold and F. K. Hamlin*, for respondent.

BAXTER, Circuit Judge, made the following memorandum: \*

There were several points presented and urged in the argument of this case, on the hearing which, in the view I have taken of it, need not be discussed here. Suffice it to say that, from the pleadings and proofs, it very satisfactorily appears that complainant's capital stock was assessed for the year 1876 at its full value, while all other property was assessed at from thirty to forty per cent only of its real value, and that, by reason of this unequal assessment, complainant's capital stock was in the hands of its shareholders operated with an undue proportion of the public taxes. It is not important to inquire into the methods leading to such a result. Whether from inadvertence or design, the consequences are the same to the complainant. It is an injustice that contravenes the

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\*The clerk of the court, in a letter to the reporter of this volume, under date of April 15, 1878, says: "There was no written opinion in the case other than the memorandum herewith inclosed."

Constitution of Ohio, as well as the provisions of the National Banking Law, and a wrong which the courts may, when their powers are properly invoked, take cognizance of to redress. But the defendant insists that the wrong complained of is a wrong to complainant's shareholders, against whom the tax was assessed, and not against the complainant. This objection seemed, on first impression, to have been well taken, but further reflection induces the belief that it involves the rights of complainant as well as the rights of its corporators. Between the two there is an intimate connection; the legal entity—the corporation—is distinct from the shareholders, but the former is a trustee for the latter, and custodian of corporate funds; and if it shall pay the taxes so assessed, and assume to deduct the same from dividends declared, or to be hereafter declared in favor of its shareholders, it may, and the averment is that it will, subject itself to a multiplicity of suits with its own shareholders; whereas, if it refuses to pay these taxes, it will impair its credit, embarrass its business, and expose itself to vexatious and expensive suits, and entail upon itself irremediable injuries in resisting the illegal exactions made upon it.

Hence, in view of the probable consequences, I have reached the conclusion that the complainant, in its corporate capacity, is entitled to a standing in this court, and to relief, and I shall, therefore, authorize a decree permitting complainant to pay to the defendant, or into the registry of the court, forty per cent of the amount of the tax assessed against its shareholders, in accordance with its tender heretofore made, and, on this being done, an injunction be issued perpetually enjoining the collection thereof. The costs will be decreed against defendant, to be paid out of the money to be realized under decree hereinbefore authorized.





# MEMORANDA

## OF CASES NOT REPORTED IN FULL.

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### KNIGHT V. OLD NATIONAL BANK.

(4 American Law Times Reporter, 240.)

THAT National banks could, by by-law, restrain the transfer of stock by a stockholder indebted to the bank. The Supreme Court of the United States has decided otherwise. *Bullard v. Bank, ante*, 93.

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### NATIONAL EXCHANGE BANK V. MOORE.

(2 Bond, 170.)

IN this case it was decided that the penal consequence of making a usurious loan by a National bank is forfeiture of twice the amount of illegal interest, under section 30 of the National Bank Act of Congress of June 3, 1864. The principal debt is not forfeited. Nor does the mere fact that such a loan is prohibited by statute, without any words declaring the contract void, preclude the bank from recovering back the amount loaned.

The point adjudicated in this case has since been settled by the Supreme Court of the United States. See *Farmers and Mechanics' National Bank v. Dearing, ante*, p. 117.

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### CITIZENS' NATIONAL BANK V. LEMING.

(8 Internal Revenue Record, 132.)

IT was held in this case that under section 30 of the National Banking Act, where a bank in Ohio charged more than the legal rate of interest of that State, it forfeited the whole of the

usurious interest, and could have judgment only for the original sum loaned. The act was not intended to work a forfeiture of the whole debt. See *Farmers and Mechanics' National Bank v. Dear- ing*, ante, p. 117.

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BOWDEN V. MORRIS.

(1 Hughes' Circuit Court, 378.)

HERE, on the trial of a suit *at law*, brought by the receiver of a National bank against its stockholders for a contribution of a hundred per cent to meet the liabilities of the bank, under section 5151 of the Revised Statutes of the United States, no evidence was presented to show that the bank was insolvent, or that it was so to the extent of a hundred per cent of its capital stock; but the plaintiff, as to such liability, produced only a letter of the Comptroller of the Currency to the receiver, alleging that he had "determined that, in order to discharge the legal debts and liabilities of the bank, it would be necessary to enforce and collect the whole amount of the personal liability of the individual stockholders." It was held that the plaintiff was not entitled to recover, as no proof established by legal evidence had been presented at the trial of the fact that the bank was insolvent, and insolvent to the extent of one hundred per cent of its capital.

It was not decided in the above case that the letter was not properly authenticated or that it was not a sufficient order, but that extrinsic facts must be proved. In *Casey v. Galli*, ante, p. 142, it was held by the Supreme Court of the United States that the order or determination of the Comptroller is conclusive.

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STATE V. PHŒNIX BANK.

(34 Connecticut, 205.)

IT was decided in this case that the voting stockholders of the Phœnix Bank had the right, under Conn. Stat. 1863 and 1864, to make a transfer of the assets and re-organize under the National Banking Law. The act of 1863 authorized the voting stockholders to surrender the charter, and upon their doing so, divested the qualified stockholders of all further rights, except their right of equitable ownership in the assets of the deceased institution. The act of 1864 left it optional with the voting stockholders to accept

its provisions or to act without regard to them under the act of 1863. After they did so act, the State and other qualified stockholders had no right to insist upon a representation in the stock of the bank. The qualified stockholders were, however, entitled to such a distribution of the assets as they would have been entitled to if the affairs of the bank had been wound up, or its assets sold bodily in the market, that is, a full share of all the assets or avails of the sale; and they could not be required to accept par and interest for their stock. A court of equity could enforce these rights.

This case has been omitted from this volume because it was decided on a state of facts so peculiar as to render it quite improbable that the case would ever be useful as a precedent.

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#### STATE V. HARTFORD BANK.

(34 Connecticut, 240.)

IN this case it was held that a bank which has assumed to include the State and other qualified stockholders as equals in a new organization under the National Banking Act, without pursuing strictly and technically the provisions of the State act of 1864, is in no condition to insist on the exclusion of such stockholders, on the ground that the latter have not complied technically with the provisions of the act of 1864. The act of the bank in including qualified stockholders in its organization certificate, without previously ascertaining, in the mode pointed out by statute, whether they assented or not, was substantially an assumption that they assented, and a waiver of the provision of the statute as to notice and dissent, so far as made for their benefit. The action of the bank in soliciting the assent of the State treasurer, acting upon the knowledge that he intended to elect, and including the State in the organization certificate, and publishing that certificate as embracing the State, was calculated to mislead the treasurer and induce him to believe that his assent would be assumed unless he dissented, and to neglect to make any response to the notice given by the bank; and under such circumstances the State will not be held to a forfeiture.

This case has been omitted for the same reason as the preceding case.

## CRAFT V. TUTTLE.

(27 Indiana, 332.)

IN this case it was held that under the then existing statutes of Indiana no tax could be imposed for municipal purposes on shares of stock in National banks.

The statute construed was afterward repealed, and provision made for taxing such shares. See 1 Davis' Stats. of Indiana, 90, § 70.

## CITY OF EVANSVILLE V. BAYARD.

(39 Indiana, 450.)

THIS case was to the same effect, and has been omitted for the same reason as the foregoing.

## STILTZ V. TUTEWILER.

(1 Wilson, 507.)

AFFIRMED, 48 Ind. 600; on the decision in *City of Richmond v. Scott*, ante, p. 445.

## HUBBARD V. SUPERVISORS OF JOHNSON.

(23 Iowa, 130.)

IN this case it was held that under the law of Iowa as it then was, no tax could be levied on the shares of stock in National banks. A statute was subsequently passed providing for such taxation. Laws 1868, ch. 153. See *Morseman v. Younkin*, ante, p. 460.

## SECOND NATIONAL BANK V. NATIONAL STATE BANK.

(10 Bush, 367.)

National banks can acquire no lien on their own stock to secure indebtedness of stockholders.

THE only part of the opinion relating to National banks was as follows:

"The claim of the Louisville bank to a lien on the stock under and by virtue of its articles of association or by-laws cannot be

maintained. This question is settled beyond all controversy by the two cases of the *Bank v. Lanier*, 11 Wall. 369; and *Bullard v. Bank*, 18 id. 589. No banking association organized under the National Currency Act of 1864 can create or hold such liens."

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CASE, Receiver, v. BERWIN.

(22 Louisiana Annual, 321.)

The receiver of a National bank, appointed by the Comptroller of the Currency, may take all necessary legal proceedings to collect debts due the bank.

THE following is the only part of the judgment relating to National banks:

"The statute of the United States, providing a National currency, directs that when the Comptroller shall be satisfied that any association has refused to pay its circulating notes, and is in default, he may appoint a receiver, who, under the direction of the Comptroller, shall take possession of the books, records, and assets of every description, of such association, *and collect all debts, dues and claims* belonging to the association. Statutes at Large, 1864, 114, § 50. The power to *collect debts* embraces the right to use all necessary means to obtain the object of the agency. The exception was correctly overruled."

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ABBOTT v. CITY OF BANGOR.

(54 Maine, 840.)

IT was herein decided that the statutes of Maine, as they existed in 1865 and 1866, taken in connection with the act of Congress of June 3, 1864, ch. 106, §§ 40 and 41, did not authorize the assessors of a city or town, in which a National bank was located, to assess taxes for State, county and municipal purposes, upon the stock of such bank owned by non-residents.

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PACKARD v. THE CITY OF LEWISTON.

(55 Maine, 456.)

THE word "place," as used in the proviso in § 41, ch. 106, of the act of Congress of June 3, 1864, refers to the location of the bank and not to the State authority under which the tax is to be assessed. See *Austin v. Board of Aldermen*, *post*.

## ABBOTT V. INHABITANTS OF BANGOR.

(56 Maine, 810.)

THIS was a decision as to the validity of a tax on shares of stock in a National bank under a statute which has been since repealed.

## SHOEMAKER V. THE NATIONAL MECHANICS' BANK.

(31 Maryland, 396.)

An injunction will not be granted to restrain a National bank from prosecuting a suit to collect securities given as collateral to a loan, on the ground that such loan was in excess of one-tenth of the capital stock of the bank.

SINCE the decision of the United States Supreme Court in *Union Gold Hill Mining Company v. Rocky Mountain National Bank*, ante, 151, there has been no possible question as to the validity of loans by National banks in excess of one-tenth of the capital stock.

## AUSTIN V. BOARD OF ALDERMEN OF THE CITY OF BOSTON.

(14 Allen, 359.)

IN this case it was held that a State may tax shares held in National banks organized therein under U. S. Statute of 1864, ch. 106, and may authorize the assessment of such tax in the city or town within the same State, where the owner resides.

The principal question in this case—the *place* of taxation—was settled by the act of Congress approved February 10, 1868, which provided that “the words ‘place where the bank is located and not elsewhere’ in section 41 ” of the National Banking Act should be construed to mean “the State within which the bank is located.”

The above decision was affirmed, though on other grounds, by the United States Supreme Court. See *Austin v. Aldermen*, ante, p. 15.

## SMITH V. FIRST NATIONAL BANK.

(17 Michigan, 479.)

In this case it was held a special tax on the capital of National banks was invalid.

THE court said, “this case is too plain for argument,” and cited *Van Allen v. Assessors*, *People v. Commissioners*, *Bradley v. People*, ante.

## SMITH v. WEBB.

(11 Minnesota, 500.)

IT was held in this case that under the law of Minnesota as it was in force in 1865, no tax could be levied on National bank shares. The law has since been amended. See *ante*, p. 629.

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## FIRST NATIONAL BANK OF MEMPHIS v. KIDD.

(20 Minnesota, 204.)

IT was held in this case that a copy of the organization certificate of a National bank, certified and sealed by the Comptroller of the Currency, is sufficient evidence of the corporate existence of a National bank.

The opinion simply refers to Laws U. S. 1864, ch. 106, § 6, as conclusive on that point.

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## CURTIS v. WARD.

(58 Missouri, 295.)

IN this case it was held that shares of stock in a National bank were taxable, though owned by a non-resident of the State, and the judgment was based solely on *Lionberger v. Rouse*, *ante*, p. 41, and *Tappan v. Merchants' National Bank*, *ante*, p. 100.

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## YOUNG v. VOUGH.

(8 C. E. Green, 325.)

IT was held in this case that a National bank could by a by-law prevent the transfer of shares by a stockholder indebted to the bank. The Supreme Court of the United States has since held otherwise. *Bullard v. Bank*, *ante*, p. 93.

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## BOWEN v. FIRST NATIONAL BANK OF MEDINA.

(34 Howard, 408.)

IT was held in this case that National banks are foreign corporations, and liable to attachment under a statute authorizing attachments in actions against "corporations created by or under the laws of any other State, government or country."

In 1873, March 3, the 53d section of the National Banking Act was amended so as to forbid attachment, etc. See *ante*, p. 331.

## MERCHANTS AND FARMERS' NATIONAL BANK v. MYERS

(74 North Carolina, 514.)

IN this case it was held that National banks are subject only to the penalties prescribed by the United States. The opinion states the conclusion only.

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## FRAZER v. SEIBERN.

(16 Ohio State, 614.)

IT was held in this case that shares of stock in National banks could be taxed, although the tax against State banks was not *eo nomine* a tax on shares, it being, however, equivalent to such tax. The law relating to taxation of National banks has since been changed in Ohio. See 64 O. L. 204; S. & S. 763; 74 O. L. 88.

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## LEE v. CITIZENS' NATIONAL BANK.

(2 Cincinnati Superior Court, 298.)

HELD, that National banks could restrain the transfer of stocks by one indebted to the bank, but that, under the special circumstances of that case, the transfer was good. The case is of no value; so far as its general principles are concerned, it is not law.

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## MINTZER v. COUNTY OF MONTGOMERY.

(54 Pennsylvania State, 139.)

IN this case it was held that stock in National banks is taxable for State purposes in the hands of shareholders. The point is too well settled to be questioned.

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## CITY OF PITTSBURGH v. FIRST NATIONAL BANK.

(55 Pennsylvania State, 45.)

DECIDED that a tax on National banks not in entire conformity with the act creating them was unconstitutional.



## EVERETT'S APPEAL.

(71 Pennsylvania State, 216.)

IT was held in this case that National bank shares were taxable at their market value for county purposes, although certain other property was exempt. The same point was afterward settled by the Supreme Court of the United States. *Hepburn v. School Directors, ante, p. 113.*

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## MANUFACTURERS AND MECHANICS' BANK V. THE COMMONWEALTH.

(72 Pennsylvania State, 70.)

A STATE bank, under the act of Congress of June 3d, 1864, became a National bank on the 28th of October, 1864; on the 15th of December it furnished to the Auditor-General the evidence that it had complied with the requirements of the State Enabling Act of August 2d, 1864, which was certified December 19th by the Auditor-General to the Governor, who caused publication to be made, on the 21st, that the bank had become a National institution. *Held*, that the bank was liable to the State for all taxes to December 19th.

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## GORGAS' APPEAL.

(79 Pennsylvania State, 149.)

IN this case it was decided that a tax on National bank shares was not illegal because certain other property was exempt from taxation. This point is fully covered by *Hepburn v. School Directors, ante, p. 113.*

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## BLY V. SECOND NATIONAL BANK.

(79 Pennsylvania State, 458.)

IN this case it was held that a National bank could recover money loaned, although the amount exceeded one-tenth of the capital stock. The case was decided solely on the authority of *O'Hare v. Second National Bank, ante, p. 869.*

## STORY v. O'DONNELL.

(31 Legal Intelligencer, 289.)

**H**ELD that shares of stock in National banks belonging to non-residents must be taxed at the place where the bank is situated, and that the State may direct the manner and place of taxing the shares of resident owners, and the Legislature of Pennsylvania not having separated such shares from the person of their owners, their *situs*, like that of other personal property, is at the domicile of their owner, and they are to be taxed in the town or city where he resides, not in that where the bank is located.

This is substantially only a restatement of the act approved February 10, 1868.

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## MAYOR v. THOMAS.

(5 Coldwell, 600.)

**I**N this case it was held that, under the law of Tennessee, as it then was (1868), shares of stock in National banks were not taxable. The law was afterward amended.

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## McLAUGHLIN v. CHADWELL.

(7 Helskell, 389.)

**H**ELD that shares of stock in National banks were subject to State, county and municipal taxes. The same statute was construed in *Adams v. Mayor*, ante, p. 148.

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## CLAPP v. CITY OF BURLINGTON.

(42 Vermont, 579.)

**I**N this case it was held that the owner of shares of stock in a National bank should be taxed therefor in the city or town where he resides, and not in the city or town where the bank is located. This case attempted to give a construction to the act of Congress, and as it then read, provided that shares of stock in a National bank should be taxed "at the place where such bank is located." Subsequently Congress declared that the words "place where such bank is located" should be held to mean "the State within which the bank is located." Act approved Feb. 10, 1868.

## VAN SLYKE V. STATE.

(23 Wisconsin, 656.)

IN this case it was decided that a State tax on shares of stock in National banks was valid, although the tax on State banks was not *eo nomine* a tax on shares, it being an equivalent to a tax on shares. The case was affirmed in *Baynall v. State*, 25 Wis. 112.

When this case was decided, the 41st section of the National Banking Act provided that a tax on shares of stock in National banks should not exceed "the rate imposed upon the shares in any of the banks organized under the authority of the State where such association is located." The section was afterward amended so as to omit such limitation. See *Lionberger v. Rouse*, *ante*, pp. 41, 44.



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14. —.] *Semble*, that Congress has not the power to deprive State courts of jurisdiction in such cases. *Ib.*
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21. *By receivers against stockholders.*] The provision of the National Banking Act that suits under it, in which officers or agents of the United States are parties, shall be conducted by the district attorney, is directory only, and the fact that private counsel is employed to conduct a suit by the receiver of a National bank against the stockholders thereof is not a matter of defense to the stockholders. *Kennedy v. Gibson*, 17.
22. *Comptroller to determine when proceedings necessary.*] It is the duty of the Comptroller of the Currency to decide when proceedings are necessary against the stockholders of a National bank to enforce their personal liability, and to what extent such liability shall be enforced; and in an action by a receiver to enforce such liability, such prior determination of the Comptroller must be distinctly averred and proved. *Ib.*
23. *Parties.*] Where less than the entire liability of stockholders is sought to be enforced, proceedings may be had in equity and an interlocutory decree may be taken for contribution. Where contribution only is sought, all the stockholders who can be reached by the process of the court may be joined in the suit, and it will be no objection that there are others, beyond the jurisdiction of the court who cannot, for that reason, be made co-defendants. *Ib.*
24. —.] Creditors of a National bank cannot proceed directly in their own name against the stockholders or debtors of the bank, nor are they proper parties to a suit by a receiver. *Ib.*
25. *To recover interest on claims against bank.*] Where on winding up a bank there are found to be funds enough to pay all claims and leave a surplus, the Comptroller should allow interest on the claims during the winding up proceedings, and an action will lie against the bank to recover such interest. *Chemical Nat. Bank v. Bailey*, 260.
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## ASSIGNMENTS.

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1. A National bank may attach the shares of a stockholder therein for his debt due the bank. *Hagar v. Union Nat. Bank*, 523.
2. *Cannot be issued by State courts.] The act of Congress providing that no attachment, injunction or execution shall be issued against a National bank, before final judgment, in any action in a State court, is constitutional. The Chesapeake Bank v. The First Nat. Bank of Baltimore*, 531.
3. *Against non-resident National banks.] The provision of the National Banking Act (prior to the Revised Statutes), that attachments, injunctions, etc., shall not be issued by State courts against National banks before final judgment, relates only to actions against banks where the action is brought and not to cases where the action is against a non-resident corporation. Southwick v. First Nat. Bank*, 789.
4. *Cannot be issued.] Under the provisions of the Revised Statutes of the United States, an attachment cannot be issued from a State court against a National bank before final judgment, whether such bank be located in the State or not. Central Nat. Bank v. Richland Nat. Bank*, 801.
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See BANKING BUSINESS; DEPOSITS FOR SAFE-KEEPING.

## BANKING BUSINESS.

1. A National bank may buy checks drawn on other banks, whether payable to bearer or order. *First Nat. Bank v. Harris*, 590.
2. *Right of National banks to purchase notes.*] The purchase of a promissory note by a National bank for purposes of speculation is *ultra vires*, and the bank acquires no title to and cannot recover on a note so purchased. *First National Bank of Rochester v. Pierson*, 637, and note, 639.
3. *Purchase of negotiable paper.*] In the business of banking, the purchasing and discounting of paper is only a mode of loaning money; and a National bank is authorized thus to acquire notes and bills which are perfect and available in the hands of the borrower, as well as his own paper made directly to the bank. *Smith v. Exchange Bank*, 836.
4. *May take notes and mortgages to secure debt.*] Defendant being indebted to a National bank on certain promissory notes made a new note and a mortgage to secure it, which were, by an agreement with the bank and for its use and benefit, executed and delivered to one S. without consideration from him, who also, without consideration, transferred them to the bank, and the old notes were thereupon delivered up and canceled. *Held*, (1) that there was a sufficient consideration for the note and mortgage; (2) that the bank had power to take notes and mortgages in such way and form for the purpose of securing its claim. *Shinkle v. First Nat. Bank*, 824.
5. *Right of National banks to exchange securities.*] Where a National bank received on deposit United States bonds of one class for the purpose of converting the same into bonds of another class, *held*, (1) that the bank was not a mere mandatory or bailee acting without compensation, but was liable to the depositor for the value of the bonds on its refusal to deliver them on demand; (2) that the business of receiving one class of United States bonds, to be converted into another, is within the scope of the powers conferred upon National banks by the act of Congress under which they are organized; (3) that where a certificate of deposit is inadmissible as evidence for want of a proper stamp, parol evidence is admissible of the facts it recites. *Leach v. Hale*, 466.
6. —.] *Seem* that National banks can deal in and exchange government securities. *Van Leuven v. First Nat. Bank*, 724.
7. *Dealing in stocks.*] While National banks cannot deal in stocks, they may take stock to avoid loss on a debt. *First Nat. Bank v. Exchange Nat. Bank*, 124.
8. *Power of, to take collateral security — Deposits for safe-keeping — Measure of damages on loss of bonds.*] A National bank received from a customer bonds as collateral security for a debt then existing, and for future obligations. Afterward, and after the customer had paid his indebtedness, the bonds were stolen from the bank. *Held*, (1) that the bank was not a gratuitous bailee of such bonds; (2) that it had power to take the bonds as security for existing or future loans; (3) that it was liable if it failed

BANKING BUSINESS—*Continued.*

to exercise ordinary care and diligence in keeping the bonds; and (4) that the measure of damage was the value of the bonds when stolen and not when demand of them was made. *Third Nat. Bank of Baltimore v. Boyd*, 545.

9. *When National banks are not liable for representations of officer.*] Selling railroad bonds upon commission is not within the scope of the corporate powers of a National bank; and therefore no action lies against such corporation for false representations made by its teller to induce the plaintiff to buy bonds. *Weckler v. The First Nat. Bank of Hagerstown*, 533.
10. *Deposits in, as a collateral security for the performance of agreements between third parties — Ultra vires when no defense.*] A National bank indorsed upon a contract of sale and delivery between A and B, that B had deposited \$2,500 in the bank, "to be held by us as collateral security for the faithful fulfillment of the within contract." Held, (1) that the bank had the power to receive the deposit and enter into the said contract; (2) but that, even if the contract was *ultra vires*, the bank would be estopped from setting up that defense in an action by A, as he had performed his part of the agreement, relying on the undertaking of the bank. *Bushnell v. Chautauqua Nat. Bank*, 794.
11. *Accommodation notes.*] It is no defense to an action by a National bank on a note discounted by it that the defendant made it for the benefit of the payee, and the payee agreed to pay it at maturity, and that the bank had knowledge of these facts. *Thatcher v. West River Nat. Bank*, 622.
12. *"Office or banking-house."*] The provision of the National Banking Act requiring National banks to transact their "usual business" at an office or banking-house in the place specified in their organization certificates does not prevent the purchase of coin by one bank at the banking-house of another bank. *Merchants' Nat. Bank v. State Nat. Bank*, 47.

See ACCEPTANCE, 600; DEPOSITS FOR SAFE-KEEPING.

## BANKING-HOUSE.

*Taxation of.*] See TAXATION, 629.

## BANKRUPT ACT.

*National banks not subject to.*] National banks are not subject to the Bankrupt Act, and bankruptcy courts have no jurisdiction as against such associations. If insolvent they can be wound up only in the mode provided by the National Banking Act. *In re Manufacturers' Nat. Bank*, 192.

## BANKRUPTCY.

*Right of assignee to recover illegal interest paid by bankrupt.*] See INTEREST, 317.

## BILLS.

See CIRCULATION.

## BILLS AND NOTES.

• See BANKING BUSINESS; CHECKS; PROMISSORY NOTES; SURETIES, 811.

## BOND.

1. *Sureties on official bond of cashier released by negligence of directors.*] Defendants became sureties on the official bond of a bank cashier, being induced so to do by a statement published by the directors, according to law, whereby the affairs of the bank appeared to be well managed. The cashier of the bank was a defaulter when the statement was published, of which fact the directors, by the use of slight care, might have learned. In an action on the bond for subsequent embezzlements, *held*, that the sureties were not liable; they had a right to believe that, before publishing the statement, the directors had used reasonable diligence in ascertaining the condition of the bank, and, being misled by the statement, were not bound. *Graves v. The Lebanon Nat. Bank*, 492.
2. *Presumption as to date of instrument.*] A bond was dated the — day of — 1869. *Held*, that the legal presumption was that it did not become binding on the obligors until the last day of that year. *Ib.*
3. *Acceptance of bond.*] It is not essential that National banks shall signify their acceptance of the official bonds of their officers in writing. *Ib.*
4. *Liabilities of sureties on cashier's bond.*] A surety on the bond of the cashier of a National bank is not discharged by the fact that the cashier had, before the bond was given, committed frauds upon the bank, if such frauds were unknown to the officers of the bank, although they were guilty of gross negligence in not discovering them. *Tapley v. Martin*, 611, and note, 614.
5. —.] In an action by a surety on the bond of an officer of a bank to recover an amount paid on the bond without suit, against one who had agreed to save him harmless from all loss which he might suffer as surety, the court instructed the jury that if the plaintiff made the payment without the assent of the defendant, he must show that he was legally liable, but if he procured the assent in good faith, he could recover. *Held*, that the defendant had no ground of exception. *Ib.*

*Deposited by bank to secure circulation — courts cannot control.*] See JURISDICTION, 208, 219.

## BY-LAWS.

By-laws prohibiting the transfer of stock by any stockholder who is indebted to the bank are invalid. *Bullard v. Bank*, 93; *Bank v. Lanier*, 70.

See DIRECTORS, 895.

## CAPITAL STOCK.

See STOCK; TAXATION.

## CASHIER.

1. *Power to certify checks.*] The cashier of a National bank may, without special authority, certify checks; but the directors may limit the exercise of this power. Such limitation will not, however, affect one ignorant of it and dealing with the cashier in the usual course of business. *Merchants' Nat. Bank v. State Nat. Bank*, 47, and note, 61.

CASHIER—*Continued.*

2. As to the powers and duties of cashiers, *see note*, 61.

3. *Lists of shareholders.*] A State statute requiring cashiers of National banks to send, annually, lists of shareholders and the amount of their shares to the town clerks, is valid, and a cashier is liable to the penalty imposed for a failure to comply with the law. *Waite v. Dowley*, 137.

*Authority of, to take special deposits.*] *See* DEPOSITS FOR SAFE-KEEPING.

*Official bond of.*] *See* BOND.

## CERTIFIED CHECK.

*See* CHECK.

## CHATTEL MORTGAGE.

1. *Right of National bank to take chattel mortgage.*] A National bank has a right to take a chattel mortgage for the purpose of securing a previously contracted debt, and to enforce the same. *Spafford v. First Nat. Bank of Tama City*, 486.

2. —.] National banks may take chattels as security for loans and discounts *Pittsburgh, etc., v. State Nat. Bank*, 315.

## CHECK.

1. *Certification of checks by National banks.*] National banks have the power to certify checks, and this power may be exercised by the cashier without special authorization. The directors may limit his exercise of this power as they may deem proper, but such limitation will not affect a person ignorant thereof who deals with the cashier in relation to matters apparently within the scope of his power. *Merchants' Nat. Bank v. State Nat. Bank*, 47, and *note*, 61.

2. *Power of cashier—question for jury.*] Whether or not a cashier has power to certify checks in a given case is a question for the jury. *Ib.*

3. *Effect of certification of check.*] A certificate of a bank that a check is good is equivalent to an acceptance; it implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. *Ib.*

4. *When bank liable on.*] A National bank is liable to the holder in good faith of a check certified by the cashier, although the drawer had no funds in the bank when the check was certified. *Cooke v. State Nat. Bank*, 698.

5. *Acceptance of checks by National banks—parol acceptance.*] The act of Congress of March 3d, 1869 (R. S., § 5208) making it unlawful for National banks to certify checks unless the drawer has at the time an amount of funds on deposit equal to the amount specified in the check, does not invalidate an oral acceptance of a check or promise to pay a check, there being at the time sufficient funds of the drawer in possession to meet it. *First Nat. Bank v. Merchants' Nat. Bank*, 915.

CHECK—*Continued.*

6. —.] A check drawn on a National bank was presented for acceptance, whereupon the bank promised to pay it as soon as it received information that a certain draft left with it for collection was paid. The draft was paid and the bank informed. *Held*, that the acceptance was good and binding on the bank. *Ib.*
  7. *National banks may buy checks.*] A National bank has authority to buy checks of individuals on other banks, whether payable to bearer or to order. *First Nat. Bank of Rochester v. Harris*, 590.
  8. *Delay in presenting check for payment.*] A check drawn in Boston on a bank in Boston was sent by mail to Rochester, N. Y., and there bought by a National bank four days after its date, and two days after was presented for payment. *Held*, that there was no unreasonable delay, and that the buyer was not subject to equities existing between the original parties. *Ib.*
- Right of revenue collector to examine.*] See EXAMINATION, 154.

## CIRCULATION.

1. Congress may lawfully tax the circulation of State banks used for currency or paid out by State or National banks. *Veazie Bank v. Fenno*, 22.
2. Congress may restrain the circulation of notes issued by State banks. *Ib.*
3. *National bank bills are United States currency.*] The notes or bills issued by the National banks of the United States, which are authorized by law to circulate throughout the Union as a medium of trade, are included in the phrase, "United States currency." Larceny of such notes is, therefore, larceny of United States currency. *State v. Gasting*, 508.
4. *Taxation of circulation.*] The circulating notes and bills of National banks may be taxed by the State. *Board v. Elston*, 425; *Ruffin v. Board*, 806; *contra, Horne v. Green*, 643.

## CITIZENSHIP.

1. A National bank is a foreign corporation under a statute requiring corporations created by "the laws of any other State or country," to give security for costs. *Nat. Park Bank v. Gunst*, 797, and note.
2. *As to removal of causes.*] National banks are citizens of the State where located within the meaning of the statutes relating to removal of causes. *Davis v. Cook*, 656; *Cooke v. State Nat. Bank*, 698; *Chatham Nat. Bank v. Merchants' Nat. Bank*, 769.

## COLLATERAL SECURITY.

1. National banks may take personal chattels as security for loans and discounts. *Pittsburgh, etc., v. State Nat. Bank*, 315.
2. National banks can make loans on security of their own stocks only to prevent loss on debts previously contracted. *Bank v. Lanier*, 70.
3. A National bank may take bonds and stocks as security for existing or future loans and is liable for only ordinary care in preserving such security. *Third Nat. Bank v. Boyd*, 545.

COLLATERAL SECURITY— *Continued.*

4. National banks may lend money upon the personal obligation of the borrower secured by a pledge of stock of a corporation as collateral security. *Shoemaker v. Nat. Mechanics' Bank*, 169; *Canfield v. State Nat. Bank*, 312. When one holding shares in National banks as collateral security is liable to creditors.] See STOCKHOLDER, 406, 471, 554.

## COMPROMISE.

See JURISDICTION, 181.

## COMPTROLLER OF CURRENCY.

1. *Determination of, as to proceedings against stockholders.*] It is the duty of the Comptroller of the Currency to determine when proceedings shall be taken against stockholders to enforce their liability and to what extent such liability shall be enforced, and such prior determination must be alleged and proved in an action to enforce such liability. *Kennedy v. Gibson*, 17.
2. —.] The determination of the Comptroller of the Currency as to when and to what extent the individual liability of stockholders shall be conferred, is conclusive. *Kennedy v. Gibson*, 17; *Casey v. Galli*, 142; *Bailey v. Sawyer*, 356.

## CONSTITUTIONAL LAW.

1. *Right of Congress to tax circulation of State banks.*] The tax of ten per cent imposed by the act of July 13, 1866 (14 Stat. at Large, 146, § 9) on the circulation of State banks used for currency and paid out by the National or State banks is not repugnant to the Constitution, either on the ground that the tax is a direct tax, which must be apportioned among the several States, or that the act impairs franchises granted by the State. *Veazie Bank v. Fenno*, 22.
2. *Restraint of circulation of notes of State banks.*] Congress, having undertaken, in the exercise of undisputed constitutional power, to provide a currency for the whole country, may constitutionally secure the benefit of it to the people by appropriate legislation, and to that end may restrain, by suitable enactments, the circulation of any notes not issued under its own authority. *Id.*
3. —.] *Semble*, that Congress has no constitutional right to deprive State courts of jurisdiction of actions against National banks located in other States. *Cooke v. State Nat. Bank*, 698.

See ATTACHMENT, 531.

## CONVERSION.

1. *Of State bank into National bank — right of State to exact bonus.*] A State bank was by its charter required to pay the State a tax or bonus on its capital paid in. A statute afterward authorized State banks to reorganize as National banks, provided that all sums required by their charters to be paid to the State continued to be paid as theretofore. *Held*, that a State bank had the right to surrender its charter, and by so doing discharged

CONVERSION—*Continued.*

itself from its obligation to pay the required bonus, and that the State could not require it, in reorganizing as a National bank, to pay any bonus *State v. The Nat. Bank of Baltimore*, 528.

2. *Effect of.*] The conversion of a State bank into a National bank, under the act of Congress of June 3d, 1864, did not work an annihilation or dissolution, but only a change of the bank. *Maynard v. Bank*, 892.
3. —.] Such change does not adeem a residuary legacy in certain shares of the bank, limited upon a life estate in such shares which is to become an absolute one, in case the bank should pay off or refund its stock, by reason of the expiration of its charter or from any other cause. The change is not equivalent in law to a paying off in fact, and the residuary legatee is entitled to the stock on the death of a legatee for life. *Ib.*
4. —.] When a bank, organized under the laws of a State, reorganizes as a National bank under the act of Congress, it escapes none of its liabilities by the change. *Coffey v. The National Bank of Missouri*, 644.
5. *Measure of damages.*] In an action of trover against a bank, after its reorganization as a National bank, for the value of certain special deposits in coin made prior thereto; *held*, that the measure of damage was the value of the coin at the date of its conversion, with interest thereon. *Ib.*

## CORPORATION.

*Evidence of incorporation.*] See EVIDENCE; ORGANIZATION.

*When incorporation cannot be questioned.*] See ESTOPPEL, 142, 406, 784.

## COSTS.

A National bank suing in New York must give security for costs. *Nat. Park Bank v. Gunst*, 797, and note.

## COUNTER-CLAIM.

1. In an action by a National bank the defendant cannot be allowed a counter-claim for unlawful interest paid by him more than two years prior thereto. *Nat. State Bank v. Boylan*, 798.
2. One of two or more defendants cannot set up an individual counter-claim, unless, under the pleadings, there can be a several judgment against him. *Ib.*

## CREDITORS.

Creditors are not proper parties to an action against stockholders, to enforce their liability. *Kennedy v. Gibson*, 17.

## CURRENCY.

See CIRCULATION.

*When transfer of stock to escape liability to, void.*] See STOCKHOLDERS, 271.

## DAMAGES.

*On loss of bonds pledged as collateral.*] See BANKING BUSINESS, 545; CONVERSION, 644.

*For sale of shares subject to lien.*] See SALE, 921.

## DEBTS.

Where, from the tax on other moneyed capital, the entire indebtedness of the owner was deducted, a tax on National bank shares was held invalid, because no similar deduction was made. *City Nat. Bank v. Paducah*, 300.

*Against National banks, what are.*] See WINDING UP, 454.

*Deduction from tax on account of.*] See TAXATION, 684.

## DEPOSITARIES.

*Of public moneys.*] See PUBLIC DEPOSITARIES, 363.

## DEPOSITORS.

See SET-OFF, 758.

## DEPOSITS.

1. *Set-off against debt in bank.*] A National bank having become insolvent, a depositor therein assigned his deposit to a debtor of the bank. *Held*, that the latter could not offset such deposit against his debt in an action thereon. *Venango Nat. Bank v. Taylor*, 842.

2. —.] A depositor may set-off his deposit against a debt due the bank when the bank becomes insolvent. *Platt v. Bently*, 758.

3. *When demand of, not necessary.*] Where a National bank has, by its own default, been placed in the hands of a receiver, a demand of payment of a deposit is no longer a necessary condition precedent to a right of action for the deposit, and the deposit bears interest from the time of such default. *Chemical Nat. Bank v. Bailey*, 260.

4. *Interest on, after demand and refusal.*] A National bank, holding deposits, refused to pay the same on demand and thereafter a receiver was appointed. *Held*, that the depositor was entitled to interest thereon from the date of the demand. *Nat. Bank of Commonwealth v. Mechanics' Nat. Bank*, 133.

5. —.] The entire principal of the deposits, but no interest thereon, was paid by the receiver. *Held*, that interest upon the aggregate of unpaid interest was recoverable. *Ib.*

6. *Nature of claim for deposits.*] The claims of depositors in a suspended National bank are, when proved to the satisfaction of the Comptroller of the Currency, on the same footing as if they were reduced to judgments. *Ib.*

*Of bank to secure circulation—courts cannot interfere with.*] See JURISDICTION, 208, 219.

## DEPOSITS FOR SAFE-KEEPING.

1. *National bank not authorized to take.*] The taking of special deposits, to keep merely for the accommodation of the depositor, is not within the authorized business of National banks; and the cashiers of such banks have no power to bind them on any express contract accompanying, or any implied contract arising out of, such taking. *Wiley v. First Nat. Bank*, 905, and note.



DEPOSITS FOR SAFE-KEEPING.—*Continued.*

2. *Power of cashier to take.*] The cashier or other executive officer of a National bank has not, in the absence of special authority from the directors or of a usage or practice so to do, power to receive, on behalf of the bank, property for safe-keeping. *First Nat. Bank v. Ocean Nat. Bank*, 728.
3. —.] *Quere* as to the power of a National bank to become a bailee of property either gratuitously or for hire. *Ib.*
4. *Liability for.*] A gratuitous bailee is only liable for gross negligence; he is not bound to any special or extraordinary measures to protect the property, and the negligence with which he can be charged, or which is the proper subject of evidence, is only that which is connected with and directly contributes to the loss. *Ib.*
5. *Admissions of officers.*] In an action against a bank for the loss of property which it had received as gratuitous bailee, *held*, that the declaration and admissions of the president, tending to show negligence on his part, made after the transaction, and when not acting within the limit of his authority, were not binding upon the bank. *Ib.*
6. *Liability of National banks as to deposits for safe-keeping.*] *Semble*, a National bank which habitually receives special deposits for safe-keeping as matter of accommodation, is bound by the act of its cashier in receiving, on special deposit, a package of stocks and bonds. The bank, though acting without reward, becomes a bailee and is responsible for gross negligence. *Chattahoochee Nat. Bank v. Schley*, 379.
7. *Power to withdraw deposits.*] If a person withdraws from a bank a special deposit, in pursuance of authority conferred upon him by the depositor, the bank is discharged, though at the time its officers were not aware of his authority. *Ib.*
8. —.] Written authority indorsed on a certificate of deposit of stocks and bonds to pay to a certain person dividends or coupons is no authority for surrendering the stocks and bonds themselves. *Ib.*
9. *Liability of National bank for.*] In an action to recover of a bank the value of bonds deposited for safe-keeping by plaintiff, and stolen by the teller of the bank, *held*, that the bank being a gratuitous bailee was not liable, although an examination of the teller's accounts, after the theft, proved them to have been falsely kept, and showed that he had been abstracting funds for two years, and although it was known to the president of the bank that he had dealt once or twice in stocks. Mistaken confidence is not a ground of liability in such cases. *Scott v. Nat. Bank*, 864.
10. *Negligence in keeping.*] Whether or not a National bank has the power to take bonds, etc., on deposit for safe-keeping, it is not liable for the loss of such property so taken without compensation, unless it has been guilty of gross negligence contributing to the loss. *De Haven v. Kensington Nat. Bank*, 882.
11. *Liability of bailee.*] In an action against a National bank to recover bonds deposited with it for safe-keeping, without compensation, and which the

DEPOSITS FOR SAFE-KEEPING—*Continued.*

bank alleged were stolen from its vaults, *held*, (1) that the bank was liable only for gross negligence; (2) that its failure to give prompt notice of the robbery was a question for the jury as bearing on the question of negligence; and (3) that while the mere voluntary act of the cashier in receiving the funds would not subject the bank to liability, yet if the deposit was known to the directors and they acquiesced in its retention, a contract relation was created by which the defendants would be held bound. *First Nat. Bank v. Graham*, 875.

*See* BANKING BUSINESS.

## DIRECTORS.

1. *Qualification of.*] Where no qualification is required and there is no usage to control, a person who is elected a bank director is presumed to accept the office unless he decline it. This presumption may be rebutted. Whether simple non-action as a director, for five months, would be ordinarily sufficient to rebut it—*query*. But where the stockholders of a bank, in an instrument authorizing its conversion from a State to a National bank, named all the directors who had been elected at the last annual election as those who are now directors of said bank," the court cannot hold that two of those so named were not directors at the time of such conversion, because they had never acted in that capacity since their election five months previously. *Lockwood v. American Nat. Bank*, 895.
2. —.] By the provisions of section 44 of the National Banking Act, upon conversion of a State to a National bank, all the directors of the former become those of the latter, until an election or appointment by the National bank. *Semble*, that no oath is required from these *ad interim* directors, the oath prescribed by section 9 of the aforesaid act being designated for those regularly elected by the National bank, but, assuming its necessity, a majority of those who were the directors of the State bank before its conversion is necessary to make a quorum of the board of the National bank. *Ib.*
3. *Number necessary to hold meeting.*] In all cases where an act is to be done by a corporate body or a part of a corporate body and the number is definite, a majority of the whole number is necessary to constitute a legal meeting, although at a legal meeting, where a quorum is present, a majority of those present may act. *Ib.*
4. *By-laws.*] Hence, a by-law adopted at a meeting of six *ad interim* directors of a National bank, which had twelve directors before its conversion, is invalid, because not adopted by a majority or quorum of the board. *Ib.*

*Right of, to remove officers.*] *See* OFFICERS.

*Negligence of.*] *See* BONDS; DEPOSITS FOR SAFE-KEEPING.

## DISCOUNTS.

*See* LOANS AND DISCOUNTS.

## DISSOLUTION.

*Of National banks abates actions against.*] *See* ACTION, 109.

## DISTRRAINT.

See PAYMENT, 268.

## DIVIDENDS.

1. *Lien of National bank on dividends.*] A National bank has a lien on and the right to hold a cash dividend as pledge for the indebtedness of the shareholder to the bank. *Hagar v. Union Nat. Bank*, 523.
2. *Attachment of shares.*] A National bank may attach the shares of a stockholder therein for his debt due the bank. *Ib.*
3. *Demand of dividend.*] A National bank sued a shareholder therein for money due and attached his shares. Pending the suit he demanded payment of the dividends declared upon the attached shares, which was refused. He afterward settled the suit and brought an action for his dividends, without renewing his demand. *Held*, that the demand while the shares were attached was a nullity, and as dividends were not payable until demanded, the action could not be maintained. *Ib.*

## DRAFT.

See ACCEPTANCE.

## EMBEZZLEMENT AND LARCENY.

1. *Embezzlement and false entries by officers of National banks.*] The president of a National bank was charged before a United States Commissioner with embezzlement of the funds of the bank, and with having made false entries in its books, and, after examination, was held for trial. The proceedings having been brought before the District Court for review by *habeas corpus*, and *certiorari*, *held*, (1) that the court would examine the evidence and do what the commissioner ought to have done; (2) that if the evidence showed probable cause of the defendant's guilt he was rightfully held for trial; (3) that proof of the *de facto* existence of a bank called a National bank and that the defendant acted as president of it was sufficient to establish the legal incorporation of such bank and of the defendant's official connection therewith. *In the Matter of Van Campen*, 185.
2. *False entries.*] Where false entries are made in the books of a bank by a clerk in the bank, by direction of the president, the latter is liable therefor as principal. *Ib.*
3. *Intent.*] An intent to defraud a bank is to be inferred from the fact of embezzlement. *Ib.*
4. *What is embezzlement.*] Where the president of a National bank, charged as trustee with the administration of the funds of the bank in his hands, converts them to his own use, he embezzles and abstracts them, within section 55 of the National Banking Act (13 Stat. at Large, 116) unless he shows authority for so doing. *Ib.*
5. *Indictment for embezzling and misapplying funds of bank — evidence of intent.*] The cashier of a National bank was indicted under section 55 of the act of 1864 (13 Stat. at Large, 116), for embezzling, abstracting and

EMBEZZLEMENT AND LARCENY—*Continued.*

willfully misapplying the moneys and funds of the bank "with intent to injure or defraud the association." *Held*, that the intent to injure or defraud was conclusively presumed upon proof of the act charged, and that therefore evidence was not admissible to prove that the cashier used the funds with the knowledge and consent of the president, and some of the directors of the bank, and on account of and for the benefit of the bank. *United States v. Taintor*, 256.

6. *By officers and servants of National banks—jurisdiction of State courts of the offense.*] A State statute prescribed punishment for any officer or servants of any bank, "incorporated by authority in this State" who should purloin, etc., any moneys, etc., belonging to or deposited in such bank. *Held*, (1) to apply to tellers of National banks; (2) that a teller of such bank could be punished under the statute for purloining property deposited with the bank for safe-keeping, but (3) *semble* that such teller could not be punished under the statute for purloining or embezzling the property of the bank. *State v. Tuller*, 375.
7. —.] State courts have no jurisdiction of offenses created by act of Congress, and, therefore, such courts cannot punish officers of National banks for embezzling the property of the bank; but State courts can punish such officers for purloining the property of others. *Ib.*
8. —.] A State statute made it larceny for any "officer of an incorporated bank" to fraudulently convert to his own use property of the bank or belonging to any person and deposited therein. *Held*, (1) to apply to officers of National banks located in the State; and (2) that a State court had jurisdiction of an indictment under the statute against an officer or servant of a National bank for the fraudulent conversion of the property of individuals deposited in such bank. *Commonwealth v. Tenney*, 568.
9. *Fraudulent conversion—intent.*] An officer of a National bank took bonds deposited with the bank and sent them to a broker in another State as collateral security for money advanced. *Held*, a fraudulent conversion and larceny within the statute. *Ib.*
10. *By officers of National banks—jurisdiction of offense.*] A State court has no jurisdiction of the crime of embezzlement by an officer of a National bank situate within the State; and since the National Banking Act makes such embezzlement a misdemeanor, an accessory thereto cannot be indicted in a State court under a statute making an embezzlement, or the being accessory thereto, a felony. *Commonwealth v. Felton*, 573.
11. —.] State courts have jurisdiction over larcenies committed upon the property of National banks, by their officers. *Commonwealth v. Barry*, 605, and note, 610.
12. —.] The fact that an officer of a National bank, who has stolen its property, is subject to punishment for embezzlement under the National Banking Act, does not relieve him from liability to punishment for the same act as a larceny at common law, or under the statutes of a State. *Ib.*

EMBEZZLEMENT AND LARCENY—*Continued.*

13. —.] Where the property of a National bank is intrusted to the teller during the day while engaged in transacting its business, but at night is placed in a safe which he cannot rightfully open, if he abstracts the property from the safe at night and converts it to his own use, his offense is larceny and not embezzlement. *Ib.*

*See* STATE V. GASTING, 508.

ESTOPPEL.

1. An action having been commenced in a State court against an insolvent National bank, the receiver of the bank appointed by the Comptroller of the Currency was, on his own application, substituted as defendant. *Held*, that the receiver was not thereby estopped from questioning the jurisdiction of the court. *Cadle v. Tracy*, 230.
2. A shareholder in a National bank, who has participated in its transactions as such and received dividends, is estopped from denying the legality of its incorporation. *Casey v. Galli*, 142; *Wheelock v. Kost*, 406.
3. One accustomed to deal with a National bank as such, and who so deals with it in respect to a promissory note, is estopped from denying the incorporation of the bank in an action on the note. *Nat. Bank v. Phoenix Warehousing Co.*, 784.

*See* BANKING BUSINESS, 794.

EVIDENCE.

1. *Of appointment of receiver.*] The certificate of the Comptroller of the Currency duly made is sufficient evidence of the appointment of the receiver in an action brought by him. *Platt v. Beebe*, 725.
2. —.] A copy of the certificate of organization of a National bank, certified by the Comptroller of the Currency and authenticated by his seal of office, is competent evidence in a State court. *Tapley v. Martin*, 611.
3. *Of incorporation — certificate of organization.*] In an action by "The West River National Bank of Jamaica, Vermont," *held*, that the certificate of the Comptroller of the Currency of the existence of a corporation under the name of "The West River National Bank of Jamaica," described as located in the town of Jamaica, Vermont, was admissible under the general issue for the purpose of proving the plaintiff's corporate existence. *Thatcher v. West River Nat. Bank*, 622.
4. —.] It is no objection to the admission in evidence of the certificate of the organization of a National bank, that the notary before whom it was acknowledged was one of the shareholders of the bank. The Comptroller's certificate of compliance with the act of Congress removes any objection which might otherwise have been made to the evidence on which he acted. *Ib.*
5. —.] The certificate of the Comptroller of the Currency is conclusive evidence of the validity of the organization of the bank in an action against the stockholders. *Casey v. Galli*, 142.
6. *Of incorporation in suits by National bank.*] In an action by a National

EVIDENCE—*Continued.*

bank against the maker of a promissory note, the fact that the note is made payable at the plaintiff bank is not conclusive evidence that such bank is a corporation. *Hungerford Nat. Bank v. Van Nostrand*, 589.

*See* ACCEPTANCE ; ADMISSIONS.

## EXAMINATION.

1. *Of National bank by revenue collectors.*] Paid bank checks which were duly and sufficiently stamped at the time they were made are not "articles or objects subject to taxation," and an officer of a bank may lawfully refuse to allow a collector of internal revenue to examine such checks. *United States v. Mann*, 154.
2. —.] The law under which National banks are incorporated does not exempt them from examination by the internal revenue officers, mentioned in section 3177 of the Revised Statutes. *The United States v. Rhawn*, 358.
3. —.] A clerk of a supervisor of internal revenue is, however, not such an officer. *Ib.*

## FOREIGN CORPORATION.

*See* CITIZENSHIP.

## FRAUDULENT CONVERSION.

*See* EMBEZZLEMENT AND LARCENY, 568.

## INCREASE OF CAPITAL STOCK.

*See* STOCK, 898.

## INCORPORATION.

*Of National bank.*] *See* ORGANIZATION.

## INDICTMENT.

*See* EMBEZZLEMENT AND LARCENY.

## INJUNCTION.

A Circuit Court may, at the suit of a stockholder, enjoin officers of a National bank from any misapplication of the funds. *Shoemaker v. Nat. Mechanics' Bank*, 169.

*When granted to restrain collection of tax on bank.*] *See* TAXATION, 267, 326.

*When granted at suit of bank to restrain tax on shares.*] *See* TAXATION, 267, 300, 926.

## INSOLVENCY.

1. *Evidence of.*] A return of *nulla bona*, made by a sheriff upon an execution

INSOLVENCY—*Continued.*

issued against a National bank, is sufficient evidence of its insolvency. *Wheelock v. Kost*, 406.

2. *Transfers of bank property in contemplation of insolvency.*] To render a transfer by a National bank made after an act of insolvency, or in contemplation of insolvency, void, under section 52 of the act of 1864 (R. S., § 5242), it must have been made either with a view to prevent the application of the assets in the manner prescribed by the National Banking Act, or with a view to the preference of one creditor to another. *Casey v. La Société de Crédit Mobilier de Paris*, 285.
3. —.] The preference of one creditor to another, mentioned in section 52 of the act of 1864, is a preference given to an existing creditor for a pre-existing debt; and does not refer to a case where one makes a loan to a bank and receives a concurrent transfer of property as security therefor. *Ib.*
4. —.] A bank, being in an embarrassed financial condition, received a loan of money from defendant upon depositing with a certain commercial firm a portion of its assets as security. *Held*, that the fact that one of the members of such firm was president of the bank did not render the transaction illegal; and that the bank could not escape liability for such loan on the ground that the president had no authority to effect it where it appeared that it was effected with the knowledge of the directors, and the money was received and used by the bank. *Ib.*
5. *National banks.*] The word "insolvency," as used in section 52 of the act of 1864 (13 Stat. at Large, 115; R. S., § 5242), making void all transfers, assignments, payments, etc., "made after the commission of an act of insolvency or in contemplation thereof," is synonymous with the same word as used in the Bankrupt Act, and means a present inability to pay in the ordinary course of business. *Case v. Citizens' Bank of Louisiana*, 276.
6. *Transfers in contemplation of.*] To make transfers, assignments, etc., void under said section 52, it is only necessary that the insolvency should be in the contemplation of the bank making transfers; the party receiving the transfers need not know of or contemplate such insolvency. *Ib.*

*See* WINDING UP.

INSOLVENT BANKS.

*See* WINDING UP.

INTENT.

*See* EMBEZZLEMENT AND LARCENY, 185, 256.

INTEREST.

1. *National banks not governed by State usury laws.*] National banks are not governed by the usury laws of a State, and the only penalties incurred by them for taking excessive interest, are those imposed by the National Banking Act. *Farmers and Mechanics' Nat. Bank v. Dearing*, 117;

INTEREST—*Continued.*

- Davis v. Randall*, 600; *Central Nat. Bank v. Pratt*, 595; *First Nat. Bank v. Garlinghouse*, 811; *Shinkle v. First Nat. Bank*, 824.
2. *Effect of usury on note.*] Where a National bank exacts illegal interest on the discount of a note the interest-bearing power of the obligation is destroyed and there will be no time from which it can bear interest. *Lucas v. Government Nat. Bank*, 872.
  3. *What interest National banks may charge.*] Where the general rate of interest in a State is higher than that allowed to State banks of issue, National banks may take the higher rate. *Tiffany v. Nat. Bank*, 90.
  4. —.] A National bank is limited, in its right to take or charge interest on its loans and discounts, to the rate of interest allowed by the State laws to banks of issue organized under those laws, if the rate so allowed is different from the general rate allowed by the laws of the State. *Shunk v. First Nat. Bank*, 820.
  5. —.] National banks are not authorized to take the rate of interest allowed by special statutes of a State to a few banks of issue where such rate is higher than that allowed to banks of issue generally. *Duncan v. First Nat. Bank of Mt. Pleasant*, 360.
  6. —.] By the statute of Kentucky no more than six per cent interest could be exacted, but parties were allowed to contract to pay and receive ten per cent "by memorandum in writing, signed by the party chargeable thereon, and not otherwise." A National bank located in the State discounted notes, charging interest in advance at the rate of ten per cent without other "memorandum in writing" than the notes, wherein was a promise to pay the principal and accrued interest at the rate of ten per cent. *Held*, that the transaction was not usurious. *Newell v. Nat. Bank of Somerset*, 501.
  7. —.] By the statute of a State, six per cent was declared to be the legal rate of interest, but parties were authorized to agree in writing for a higher rate not exceeding ten per cent. *Held*, that National banks located in the State could charge ten per cent. *Wiley v. Starbuck*, 436.
  8. *On loans to corporations in New York.*] In New York the rate of interest which a corporation may pay is not limited. A National bank, located in that State, loaned money to a corporation at a rate of interest exceeding seven per cent per annum. *Held*, that the interest on the loan was forfeited under section 30 of the National Banking Act (13 Stat. at Large, 108), which provided that when no rate of interest was fixed by the law of a State, a National bank might charge a rate not exceeding seven per cent, and that if it charged more, the entire interest should be forfeited. *In re Wild*, 246.
  9. *Forfeiture.*] In an action by a National bank upon a note discounted at a usurious rate of interest the bank can recover the amount of the principal less the interest received. *Farmers & Mechanics' Nat. Bank v. Dearing*, 117.
  10. — *Extent of forfeiture—interest after maturity.*] Under section 30



INTEREST—*Continued.*

- of the National Currency Act (13 Stat. at Large, 108), the taking or charging a rate of interest greater than six per cent per annum, in advance, by a National bank located in Ohio, is a forfeiture of the entire interest which the note or other evidence of debt carries with it, or which has been agreed to be paid thereon; as well the interest accruing after maturity and before judgment, as the interest which accrued before the maturity thereof. *Shunk v. First Nat. Bank*, 820; *Lucas v. Bank*, 872.
11. *Set off, amount of.*] In an action by a National bank on negotable paper discounted by it, the defendant may set off the amount of interest in excess of the lawful rate paid on other transactions. The interest paid by the defendant beyond that authorized by the act of Congress belongs to him, and the bank can hold it only for his use. *Lucas v. Bank*, 872.
  12. —.] Where National banks stipulate for an illegal rate of interest all payments of interest, and not merely the excess, is illegal. *Overholt v. Nat. Bank*, 883.
  13. —.] In an action by a National bank to recover the amount of a note which was given in renewal of other notes, the defendant is entitled, where illegal interest has been exacted, to credit for all the interest he has paid from the beginning on the loan and not merely to the excess above the lawful rate. *Id.*
  14. —.] In an action by a National bank on a promissory note the defendant cannot set off the entire interest agreed to be paid on another and independent note although such interest was usurious. *Id.*
  15. —.] Where there has been a series of renewal notes given for the continuation of the same original loan, a taint of usury in the first transaction follows down through the whole, and in an action by a National bank on the last of the series, the borrower is entitled to credit for all the interest he has paid from the beginning. *Cake v. First Nat. Bank*, 890.
  16. *Recovery or recoupment of excessive interest.*] If a National bank discount a note at a usurious rate of interest, paying the borrower the proceeds less the interest, it can recover only the face of the note less the entire interest received. But if such note be renewed, the borrower paying the usurious interest out of his pocket, in advance, the defendant may recoup, or recover, in an independent action, double the amount of the entire interest paid at the renewal. If, instead of paying the usurious interest at each renewal, it be added to the principal and included in the renewal notes, the bank can only recover the amount originally paid to the borrower, *i. e.*, the amount of the last of the renewal notes less all interest included in it. *Nat. Bank of Madison v. Davis*, 350.
  17. —.] Under the 30th section of the National Banking Act, the remedy of the "forfeiture of the entire interest" for the exacting of unlawful interest can only be had by way of defense to an action on the note, or to recover the loan, but no action lies for it. *Brown v. The Second Nat. Bank*, 849.

INTEREST—*Continued.*

- 18.—.] *Semble*, that the "forfeiture of the entire interest" imposed for taking illegal interest is enforced only in actions brought upon or to enforce the usurious contract. *Hintermister v. First Nat. Bank*, 741.
19. *Recoupment of interest paid in advance.*] In an action on a note given for money borrowed of a National bank, the defendant cannot recoup illegal interest paid in advance. The remedies given by the National Banking Act for the taking of unlawful interest are exclusive and cannot be supplemented by the statutes of the State. *Wiley v. Starbuck*, 436.
20. *Counter-claim for excessive interest.*] In an action by a National bank the defendant cannot be allowed a counter-claim for unlawful interest paid by him more than two years prior thereto. *Nat. State Bank v. Boylan*, 798.
21. — *when right of, barred.*] The knowingly taking or receiving by a National bank of a rate of interest greater than is allowed by law upon a loan of money does not entitle the person paying the same to have it applied as a payment of so much of the principal, in an action brought to recover the principal debt more than two years after such payment was made. The rights and liabilities of the parties in such case are prescribed in the National Bank Act, and cannot be controlled by State legislation. *Higley v. The First Nat. Bank of Beverly*, 833.
22. —.] Where the two years within which an action lies to recover back twice the amount of illegal interest paid to a National bank have elapsed, the right to offset such interest against any claim of the bank is also barred. *Shinkle v. First Nat. Bank*, 824.
23. *Actions for penalty.*] Where usury has been actually paid to and received by a bank, the only remedy is an action for the penalty of "twice the amount of interest thus paid. *Brown v. Bank*, 849.
24. *Limitation of.*] The limitation of two years within which an action for the penalty must be brought commences to run from the actual payment of the usury. *Ib.*
25. —.] Where a National bank has taken usurious interest on a loan or discount, it may elect to apply the excess of interest on the principal at any time before the loan is paid in full, or before judgment is entered for the full amount. Therefore, the two years within which an action may be brought to recover twice the amount of interest paid, do not begin to run until the principal has been paid or a judgment entered for the full amount thereof. *Ib.*; *Duncan v. First Nat. Bank*, 360.
26. *Limitation of actions for excessive interest.*] In an action by a National bank on negotiable paper discounted by it, a State statute limiting the time within which action to recover excessive interest may be brought does not apply. *Ib.*; *Lucas v. Bank*, 872.
27. *Amount of recovery in actions for penalty.*] In an action against a National bank to recover the penalty imposed by the act of Congress for taking a greater rate of interest than is allowed by law, the plaintiff is entitled to recover only twice the amount taken in excess of the legal interest,

INTEREST—*Continued.*

- and not twice the amount of the entire interest paid. *Hintermister v. First Nat. Bank*, 741.
28. —.] In an action to recover the penalties imposed for taking unlawful interest, the plaintiff is entitled to recover twice the amount he has paid for usury within two years prior to the commencement of the action, whether the amount was paid in one or several payments. *Ib.*
  29. *Revised Statutes*, §§ 5197, 5198, *construed* — *rate of interest*.] A National bank located in Kansas charged and received interest at the rate of eighteen per cent per annum. *Held*, that it was liable under the National Banking Act (Rev. Stats., §§ 5197, 5198) to pay back twice the amount of interest thus received. *Crocker, assignee, v. First Nat. Bank of Chetopa*, 317.
  30. *Extent of recovery*.] The amount of the recovery is twice the full amount of interest paid, and is not limited to twice the excess of interest paid over the legal rate. *Ib.*
  31. *Right of action to recover back illegal interest passes to assignee in bankruptcy*.] If the person who paid such illegal interest is adjudged a bankrupt, the right of action passes to his assignee in bankruptcy, such assignee being his "legal representative" within the meaning of section 5198 of the Revised Statutes. *Ib.*
  32. *To whom the remedies for usury are available*.] When note or bill is an existing security in the hands of the holder the usury exacted by the bank in its acquisition is not available, by way of defense, to the antecedent parties. Their rights and liabilities are not affected by the usurious character of a transaction in which they did not participate. *Smith v. Exchange Bank*, 836.
  33. —.] The party with whom the bank had the usurious transaction is the party to whom, under the National Banking Act, the forfeiture of interest is to be adjudged; and who, in case the interest has been paid, is authorized to recover back twice the amount. *Ib.*
  34. *Interest on claims against insolvent banks*.] Where a National bank is declared in default by the Comptroller of the Currency, and a receiver is appointed, and a sufficient fund is realized from its assets to pay all claims against it and leave a surplus, the Comptroller should allow interest on the claims, during the period of administration, before appropriating the surplus to the stockholders of the bank. *Chemical Nat. Bank v. Bailey*, 260.
  35. —.] An action of assumpsit to recover such interest will not lie against the Comptroller of the Currency or the receiver of the bank, but will lie against the bank. *Ib.*
  36. *On deposits*.] Where a bank has, by reason of its own default, been placed in the hands of a receiver, a demand of payment by a depositor is no longer a necessary condition precedent to a right of action for the deposit; and the deposit bears interest from the time of such default. *Ib.*
  37. *Usury does not avoid collateral security*.] A National bank extended the time of payment of indebtedness at a usurious rate of interest, and took

INTEREST—*Continued.*

therefor notes and a mortgage made by the debtor to a third person, the notes being indorsed by the latter. *Held*, that the usury only avoided the interest, and that to the extent the debt was valid the mortgage was a *bona fide* security, and that the bank, by becoming the owner of the notes, acquired the equity in the mortgage. *Allen v. First Nat. Bank*, 828.

38. *Jurisdiction of action for penalties.*] The courts of one State have no jurisdiction of an action against a National bank located in another State to recover penalties imposed by the National Banking Act for taking unlawful interest. *Missouri, etc., Co. v. First Nat. Bank*, 401.
39. —.] *Semble*, that State courts will not enforce the penalties imposed by the National Banking Act for exacting unlawful interest. *Ib.*; *Newell v. Nat. Bank*, 501.
40. —.] An action lies in a State court against a National bank to recover the penalties imposed by Congress for exacting unlawful interest. *Ordway v. Central Nat. Bank*, 559.

*On deposits.*] See DEPOSITS.

## INTERNAL REVENUE.

*See* EXAMINATION.

## JURISDICTION.

1. *Of actions against National banks to recover penalties.*] The courts of one State have no jurisdiction of an action against a National bank located in another State, to recover the penalty imposed by the act of Congress for the taking of unlawful interest. *Missouri River Telegraph Company v. First Nat. Bank of Sioux City*, 401.
2. —.] *Semble*, that State courts have no jurisdiction of actions to recover penalties imposed by the National Banking Act. *Ib.*; *Newell v. Nat. Bank*, 501.
3. —.] A State court has jurisdiction of an action against a National bank to recover the penalties imposed by Congress for taking unlawful interest. *Ordway v. Central Nat. Bank*, 559.
4. *Of District Court to order compromise.*] A District Court of the United States may order the receiver of a National bank to compromise doubtful debts under section 50 of the National Banking Act (13 Stat. at Large, 115), which authorizes receivers to compromise such debts "on the order of a court of record of competent jurisdiction." *Petition of Platt*, 181.
5. *Of action to collect claim due bank.*] The receiver of a National bank appointed by the Comptroller of the Currency is an officer of the United States, and therefore the District Court has jurisdiction of an action at common law to collect a claim due the bank at the time of the receiver's appointment. *Platt v. Beach*, 182.
6. *Of court to appoint a receiver.*] A receiver of a National bank may be appointed by the court. *Irons v. Manufacturers' Nat. Bank*, 203; *Wright v. Merchants' Nat. Bank*, 321.
7. *Of suit to enjoin misapplication of funds by officers.*] The Circuit Court of the United States has jurisdiction of a suit to enjoin the officers of a

JURISDICTION—*Continued.*

National bank from any misapplication of funds which might result from any act not warranted by its charter, or which would amount to a breach of trust. *Shoemaker v. Nat. Mechanics' Bank*, 169.

8. *Over deposits to secure circulation — courts cannot control disposition of.*] The Circuit Court has no jurisdiction of a suit by a private person, to restrain, interfere with, or control the Treasurer of the United States, or the Comptroller of the Currency, in the discharge of their duties, in respect to bonds deposited with the Treasurer to secure the redemption of circulating notes of a National bank. *Van Antwerp v. Hulburt*, 208-219.
9. —.] The provisions of sections 56 and 57 of the National Banking Act explained. *Ib.*

*Of actions by and against National banks.*] See ACTIONS.

*Of State court over receiver.*] See RECEIVER, 792.

*Of indictments against National bank officers.*] See EMBEZZLEMENT AND LARCENY.

## LARCENY.

See EMBEZZLEMENT AND LARCENY.

## LIEN.

1. *Loans and discounts on security of bank's own stock.*] National banks can make valid loans or discounts on the security of their own stock only when necessary to prevent loss on debts previously contracted in good faith. *Bank v. Lanier*, 70.
2. —.] The placing by one bank of its funds on permanent deposit with another bank is a loan within the prohibition. *Ib.*
3. *Lien on stock.*] Loans by National banks to their stockholders do not give them a lien on the stock of such stockholders. *Ib.*
4. —.] A bank issued two certificates of stock to C, declaring him the owner of one hundred and fifty shares, and that they were transferable on the books of the bank "only on the surrender of the certificate." A purchased some of these shares of C, and received the certificate regularly assigned. The bank refused to transfer the stock on the books, on the ground that the shares had been pledged to it by C, as security for deposits made by it with him, and had already been sold and transferred to other parties under a power of attorney from C before the bank had notice of A's purchase. A sued to obtain damages. *Held*, that the action would lie, and that the pledge of the stock by C to the bank being illegal, the previous transfer was no defense. *Ib.*
5. *National banks cannot acquire lien on their own stock.*] The articles of association and the by-laws of a National bank prohibited the transfer of stock owned by any stockholder indebted to the bank until such indebtedness should be satisfied. *Held*, that the prohibition was invalid, under section 35 of the National Banking Act, and that the bank could not thus acquire a lien on the shares of the stockholders. *Bullard v. Bank*, 93;

## LIEN—Continued.

*Evansville Nat. Bank v. Metropolitan Nat. Bank*, 189 ; *Conklin v. Second Nat. Bank*, 693.

6. *Paramount lien of United States on assets of National banks.*] The National Banking Act gives to the United States a first and paramount privilege upon all the assets of a banking association organized under the act to reimburse to the United States the amount expended in paying the circulating notes of such bank association. Therefore, the privilege given to an attaching creditor over the assets of the First National Bank of Selma must be postponed to that of the privilege of the United States where it is shown, as in this case, that the Louisiana National Bank, a debtor of the First National Bank of Selma, had notice of the claim of the United States on the assets of the First National Bank of Selma before the seizure by the creditors under the attachment. *Schmidt v. First Nat. Bank*, 505.

*Sale of shares subject to.*] See SALE, 921.

## LIMITATION OF ACTION.

*Where action for penalty for excessive interest barred.*] See INTEREST, 360, 824, 849, 883.

See SET-OFF.

## LOANS AND DISCOUNTS.

1. *When banks can make, on security of its own stock.*] National banks can make valid loans and discounts on the security of their stock only when necessary to prevent loss on debts previously contracted in good faith. *Bank v. Lanier*, 70.
2. —.] The placing by one bank of its funds on permanent deposit with another bank is a loan within the prohibition. *Ib.*
3. —.] Loans by National banks to their stockholders do not give them a lien on the stock of such stockholders. *Ib.*
4. *Bank may take stock as collateral security.*] National banks may take stock as collateral security for a loan. *Shoemaker v. Nat. Mechanics' Bank*, 169 ; *Canfield v. State Nat. Bank*, 312.
5. *National banks may take pledge of chattels.*] National banks may take personal chattels (e. g., a locomotive) as security for loans and discounts. *Pittsburgh Locomotive and Car Works v. State Nat. Bank of Keokuk*, 315.
6. *Loans in excess of one-tenth of capital.*] Loans by a National bank to a person or corporation are valid and recoverable, although in excess of one-tenth of its capital stock. *Union Hill Mining Co. v. Rocky Mountain Nat. Bank*, 151 ; *Shoemaker v. Nat. Mechanics' Bank*, 169 ; *Stewart v. Nat. Union Bank*, 175 ; *Allen v. First Nat. Bank*, 828 ; *Elder v. First Nat. Bank*, 488 ; *O'Hare v. Second Nat. Bank*, 869.
7. *Renewal notes, acceptance of.*] Whether other notes have been accepted by a bank in renewal of notes sued on is a question for the jury. *Cake v. First Nat. Bank*, 890.

## MESNE PROCESS.

*See* ATTACHMENT.

## MISAPPLYING FUNDS.

*Injunction to restrain.] See* INJUNCTION.

## MORTGAGE.

*Right of National banks to take.] See* REAL ESTATE ; CHATTEL MORTGAGE, 486.

## NATIONAL BANKS.

1. *Liable for obligations of State bank.]* A State bank was robbed, and a reward was offered by the cashier for the detection of the thieves. The bank afterward became a National bank, and suit was brought against it as such for the reward. *Held*, that the action was properly brought, as the National bank was responsible for all the liabilities of the State bank. *Kelsey v. Nat. Bank*, 847.
2. ——.] No authority from a State is necessary to enable a State bank to become a National bank. *Casey v. Galli*, 142.  
*Cannot be garnisheed.] See* *Havens v. Nat. City Bank*, 783.  
*Cannot keep a branch office for discount and deposit in another State.] See* OFFICE, 784.

## NEGLECTENCE.

*Liability of banks for, in preserving special deposits.] See* DEPOSITS FOR SAFE-KEEPING.*When discharges sureties on cashier's bond.] See* BOND.

## NOTES.

*See* CIRCULATION ; PROMISSORY NOTES.

## NOTICE.

Where a statute required, that on complaint to the board of equalization that another was assessed too low, notice of such complaint should be given to such other or his agent, *held* that a National bank was the agent of its shareholders, and that notice to the bank was sufficient. *Nickerson v. Kimball*, 409.

## OFFICE.

*National banks cannot maintain branch offices in New York.]* A National bank located in another State cannot keep an office for discount and deposit in New York, and cannot maintain an action upon a note discounted at such office. *Nat. Bank v. Phoenix Warehousing Co.*, 784.

## OFFICERS.

1. *Removal of.]* Where the articles of association of a National bank, signed by all the original stockholders, and giving express authority to the directors to remove the president, have been transmitted to the Comptroller of the

OFFICERS—*Continued.*

Currency, who has, on receiving the same, issued circulating notes to the bank, he will be deemed to have approved of the articles, and the directors will have the power to remove the president, even though the bank has never legally adopted any by-laws. *Taylor v. Hutton*, 755.

2. —.] It is not necessary that any by-laws should be adopted before a president may be chosen or removed, and another appointed in his place. *Ib.*
3. —.] Section 11 of the act of Congress, relative to National banks, authorizes the directors to remove the president of a banking association. *Ib.*
4. *Directors may remove at any time.*] Plaintiff, who had been hired by the president of a National bank as teller for a specified time, refused to obey certain orders of the cashier. Some time afterward the cashier informed the president of such disobedience, and he thereupon, before the expiration of the specified time, discharged plaintiff. *Held*, that plaintiff was not entitled to recover his salary for the unexpired portion of the term of service. *Harrington v. First Nat. Bank*, 760.
5. —.] A servant may be discharged by the master for misconduct before the expiration of the time for which he was hired, although the discharge is not made at the precise time of the misconduct, nor the grounds stated. *Ib.*
6. —.] A National bank cannot hire one of its officers for a specified time. *Ib.*
7. —.] Knowledge, without objection, by the directors of a bank that one is acting in its employ does not ratify the details of a contract for his employment, by the president, unless they know of such details. *Ib.*

*Indictment of.*] See EMBEZZLEMENT.

*When bank not bound by representations of.*] See BANKING BUSINESS, 533.

## OFFICIAL BOND.

See BOND.

## ORGANIZATION.

1. *Of National bank — how put in issue.*] The organization of a National bank under the National Banking Act may be put in issue by a party who has not estopped himself. But a party who has accepted as payee a promissory note payable at a banking institution which the parties to the note style a National bank, and has sold and transferred the note to such banking institution, cannot be allowed to raise that issue by merely averring want of knowledge or information sufficient to form a belief as to whether the institution is a body corporate, etc. *Huffaker v. Nat. Bank*, 504.
2. —.] The certificate of the Comptroller is conclusive evidence of the validity of the organization of the bank in an action by a receiver against stockholders. *Casey v. Galli*, 142.

See ESTOPPEL; EVIDENCE.



PARTIES.

*To an action to enforce liability of shareholders.] See ACTION, 17.*

*When bank may maintain suit to restrain tax on shares.] See TAXATION, 825.*

PAYMENT.

1. *Of tax.] National banks may be required to pay the tax assessed on the shares. Nat. Bank v. Commonwealth, 34.*

2. —.] Under a statute providing that the tax levied against shares of stock should be paid by the bank, *held*, that payment of a tax so levied could be enforced by distraint of the property of the bank. *First Nat. Bank v. Douglas County, 268.*

3. —.] In the absence of express statutory authority, a tax collector cannot seize the property of the bank to enforce a tax assessed against shareholders. *First Nat. Bank v. Hershire, 465.*

4. —.] Where the warrant for the collection of a tax assessed against shareholders directs the collector "to levy the same of the goods and chattels of such person," the collector cannot seize the property of the bank thereon. *First Nat. Bank v. Fancher, 697.*

*Presenting check for.] See CHECK, 590.*

PENALTIES.

*Action to recover.] See ACTIONS; INTEREST.*

PERSONAL PROPERTY.

*Not taxable.] The personal property of National banks, such as safes, office furniture, etc., is not taxable. Nat. Bank v. Young, 451.*

PLACE OF BUSINESS.

*See BANKING BUSINESS.*

PLEADING.

*In an action against a stockholder to enforce his liability, the prior determination of the Comptroller that such proceeding is necessary and the extent to which the liability shall be enforced must be pleaded and proved. Kennedy v. Gibson, 17.*

PLEDGE.

*Liability of pledgee of stock.] See STOCKHOLDER, 406, 471, 554.*

PLEDGEE.

*See STOCKHOLDER.*

PRESIDENT.

*See ACCEPTANCE, 600.*

PRINCIPAL AND SURETY.

*See BOND.*

PRIVILEGED DEBTS.

*See LIEN.*

## PROMISSORY NOTES.

*Renewal notes — acceptance of.]* Whether other notes have been accepted by a bank in renewal of notes sued on is a question for the jury. *Cake v. First Nat. Bank*, 890.

*Right of bank to purchase.]* See BANKING BUSINESS, 629.

*Accommodation note.]* See BANKING BUSINESS, 622.

*Sureties on.]* See SURETIES, 811.

## PUBLIC DEPOSITARIES.

1. *National banks as depositaries of public money.]* Designating a National bank as a depositary of public moneys does not constitute it an agent of the government, or render the government liable for moneys lost by a failure of such bank. *Branch v. The United States*, 363.

2. —.] Such bank does not become a custodian of the public moneys deposited with it, but it becomes a debtor to the United States the same as it does to other depositors for individual deposits. *Ib.*

3. —.] Certain moneys coming into the possession of the clerk of a Federal court pending a litigation were by him deposited in a National bank which had been designated as a depositary of public moneys. The bank failed. *Held*, that the United States were not liable for the money so deposited. *Ib.*

## REAL ESTATE.

1. *When National banks can take mortgages on.]* A National bank may take a mortgage on real estate to secure a debt previously contracted, but not to secure either a contemporaneous loan or future advances. *Kansas Valley Nat. Bank v. Rowell*, 264; *Merchants' Nat. Bank v. Mears*, 353; *First Nat. Bank v. Haire*, 480; *Ornn v. Merchants' Nat. Bank*, 490; *Matthews v. Skinker*, 647; *Crocker v. Whitney*, 745; *Allen v. First Nat. Bank*, 828; *Fowler v. Scully*, 854; *Wood v. People's Nat. Bank*, 888.

2. *When National banks can take real security.]* A National bank cannot loan money on real estate security; but after a creditor has made default, or after a loan has been actually made, the bank may take real estate security therefor unless the transaction be colorable for the purpose of evading the statute. *Merchants' Nat. Bank v. Mears*, 353.

3. *When National bank may take mortgage on real estate.]* A National bank loaned money upon a note made by one member of a firm to another, and indorsed by the latter to the bank. The maker, when the note was made, gave the indorser a bond and mortgage on real estate to secure him against loss, and it was agreed between the parties and the bank that in case of default the security should inure to the bank. *Held*, that the bond and mortgage were not within the provision of the National Banking Act forbidding National banks purchasing real estate, and that they were legal and binding and could be enforced by the bank. *First Nat. Bank v. Haire*, 480.

4. *Mortgage of, to National bank.]* A National bank took a mortgage on real estate to secure the payment of money previously loaned. There was a

REAL ESTATE—*Continued.*

prior lien on the property which the mortgagor agreed to discharge, but he being unable to do so, the bank at his request and in order to protect its own lien advanced the money and took another bond and mortgage to secure such advance. *Held*, that such second bond and mortgage were valid. *Ornn v. Merchants' Nat. Bank*, 490.

5. *Assignment of mortgage to National bank.*] Notes secured by mortgages were assigned to a National bank, and by it to plaintiff. *Held*, in an action of foreclosure, that the mortgages were not extinguished by the assignment to the bank, and were valid in the hands of the plaintiff, he being a *bona fide* purchaser. *Richards v. Kountze*, 652.
6. —.] In the absence of evidence showing the purpose and object of the assignment to the bank, it cannot be presumed that it was for a debt created *in presenti*, in violation of the National Banking Act. *Ib.*
7. —.] *Seem*, that the limitations of the National Banking Act apply to transactions in real property, independent of legitimate banking operations, and not to mortgage securities. *Ib.*
8. *Sale under mortgage will be enjoined.*] A National bank has no power to take a deed of trust or mortgage on real estate to secure a contemporaneous loan, and a sale under such deed or mortgage to satisfy the loan will be enjoined. *Matthews v. Skinker*, 647.
9. *Purchase of, by National bank.*] A National bank has authority to purchase such real estate as may be necessary in order to secure a debt due to it, although in excess thereof, if the security of the debt be the real object of the purchase. *Upton v. Nat. Bank of South Reading*, 618.
10. —.] A National bank advanced money to a person already indebted to it and took a mortgage on real property to secure both the advance and prior indebtedness. *Held*, that the transaction was valid under the National Banking Law. *Ib.*
11. *National bank may sell real estate and take mortgage.*] A National bank may sell real estate owned by it and take back a mortgage thereon to secure the payment of the purchase-money. *New Orleans Nat. Bank v. Raymond*, 516.
12. *Deduction of, on taxation.*] A tax against National bank shares is invalid when no provision was made for deducting the value of the real estate owned by the bank from the value of the shares. *City Nat. Bank v. Paducah*, 300.

*Deductions for.*] See TAXATION, 752.

## RECEIVER.

1. *Evidence of appointment of.*] The certificate of the Comptroller of Currency, duly made, is sufficient evidence of the appointment of a receiver in an action brought by him. *Platt v. Beebe*, 725.
2. *Debtors cannot impeach appointment of.*] The debtors of a National bank, when sued by a receiver of the bank, cannot inquire into the validity of his appointment. *Cadle v. Baker*, 108.

RECEIVER—*Continued.*

3. —.] The receiver of a National bank appointed by the Comptroller of the Currency is an officer of the United States. *Platt v. Beach*, 182.
4. —.] The receiver of a National bank holds the same title to the assets of the bank that the bank held, and he has no greater right in enforcing their recovery than the bank itself would have. *Casey v. La Société de Crédit Mobilier*, 285.
5. *Whom he represents.*] The receiver of a National bank represents the bank, its stockholders and its creditors, but not in any sense the National government; nor can the government be subjected to litigation, growing out of its relations to these banks in all the various courts in which their affairs may be the subject of judicial controversy. *Case v. Terrell*, 67.
6. *Appointment of, by State court.*] A State court may appoint a receiver of a National bank where facts are presented calling for such relief, and which do not bring the case within the exact provisions of the National Banking Act. *Irons v. Manufacturers' Nat. Bank*, 203.
7. —.] The provisions of the General Banking Law for winding up National banks under the direction of the Comptroller of the Currency, are not exclusive and were not intended to oust the courts of their power to appoint a receiver upon a judgment-creditor's bill. *Wright v. The Merchants' Nat. Bank*, 321.
8. *Power of State court over.*] A State court cannot order a receiver for a National bank, appointed by the Comptroller of the Currency, to pay a judgment recovered against the bank before the appointment of the receiver. *Ocean Nat. Bank v. Carl*, 792.
9. *Action by, to collect debts.*] The receiver appointed to wind up a National bank may bring suit to collect debts due the bank either in his own name as receiver or in the name of the bank. *Bank v. Kennedy*, 87.
10. —.] Such receiver may bring an action to recover an ordinary debt due the bank without an order from the Comptroller of the Currency. *Id.*
11. *Receiver may be made party to suit against bank.*] In an action on a claim against a National bank which has suspended the receiver may be made a party defendant. *Turner v. First Nat. Bank*, 454.
12. *Action by, against stockholders.*] In an action by a receiver of an insolvent National bank against the stockholders the determination of the Comptroller as to the amount necessary to be collected is conclusive; and the shareholders are estopped from denying the validity of the organization. *Casey v. Galli*, 142.
13. *Removal of cause against.*] Receivers of National banks are not entitled to remove suits against them from the State courts to the United States courts. *Bird's Executors v. Cockrem*, 284.
14. *Action against bank after appointment of.*] An action may be brought against a National bank after a receiver has been appointed. *Bank of Bethel v. Pahquioque Nat. Bank*, 77; *Security Bank v. Nat. Bank*, 774; *Green v. Walkill Nat. Bank*, 786.

*Actions against.*] See ACTIONS.

*Action by, against stockholders, to enforce liability — parties to.*] See ACTIONS.

RECOUPMENT.

*Of excessive interest.] See* INTEREST.

REDUCTION OF CAPITAL.

*See* STOCK.

REMOVAL OF CAUSE.

1. A National bank is a citizen of the State where it is located, within the act relating to the removal of causes from State to Federal courts. *Cooke v. State Nat. Bank*, 698, and note, 714; *Davis v. Cook*, 656.
2. —.] A National bank cannot have a cause removed into the Federal court under the act of March 2, 1867, as, being a corporation, it cannot make its affidavit required by the act. *Ib.*
3. *National banks are "citizens" of State where located.]* In an action by a National bank of New York against a National bank of West Virginia, *held*, that the defendant was not deprived of the right to demand a removal of the cause from the State court to a Federal court. *Chatham Nat. Bank v. Merchants' Nat. Bank*, 769.
4. —.] National banks are "citizens" of the State in which they are organized and located. *Ib.*
5. *Entry of appearance.]* Defendant served a notice of appearance on December 15th, but did not file a petition for the removal of the cause from the State to the Federal court until January 7th, the petition stating that defendant then entered its appearance and had not done so before. *Held*, a valid compliance with the Federal statute requiring the defendant, "at the time of entering his appearance in the State court," to file his petition. *Ib.*
6. *Actions against receivers of National banks—removal of, to United States courts.]* Receivers of National banks have not the privilege in all cases of being sued in the Federal courts, and are not entitled to remove causes against them from the State to the United States courts. *Bird's Executors v. Cockrem*, 284.

REORGANIZATION.

*Of State bank under National Banking Act.] See* CONVERSION.

RESTRAINING TAX.

*When bank may maintain suit for.] See* TAXATION, 925.

REVENUE COLLECTOR.

*Right of, to examine paid checks.] See* EXAMINATION.

SALE.

1. *Of shares.]* A shareholder has an absolute right to sell and transfer his shares, and this right the directors can neither cut off nor abridge. *Bank v. Lanier*, 70; *Bullard v. Bank*, 93; *Johnson v. Laftin*, 331.

SALE—*Continued.*

2. —.] After a sale of shares and a transfer on the bonds, the vendor ceases to be a shareholder, and is freed from liability as such. *Ib.*
3. —.] *Semble*, that where the sale is complete except the transfer on the books, the vendor may file a bill to compel the vendee to record the transfer; and so the vendee may compel the bank to register the transfer or hold it liable in damages for a wrongful refusal. *Johnson v. Laflin*, 331, 344.
4. *Damages for sale of shares falsely represented to be free from such lien of tax.*] The statute of Wisconsin made taxes assessed on shares of stock in National banks a lien on such stock. The defendant sold to plaintiff shares of stock in a National bank upon which was an unpaid tax. Defendant gave plaintiff a written statement purporting to contain all facts affecting the value of the stock, but in which the tax was not mentioned. The tax was paid by the bank. *Held*, that plaintiff could recover damages of the defendant to the amount of the tax. *Simmons v. Aldrich*, 921.

*See* STOCKHOLDER.

## SECURITY.

*See* COLLATERAL SECURITY.

## SERVANTS.

*Discharge of.*] *See* OFFICER.

## SET-OFF.

1. *By depositors.*] A depositor in a National bank, which has failed and passed into the hands of a receiver, may set off the amount of his deposit against his debt to the bank on a note. *Platt, receiver, v. Bentley*, 758.
2. *Of deposits.*] A National bank becoming insolvent, a depositor therein assigned his deposit to a debtor to the bank. *Held*, that the latter could not set off such deposit against the debt. *Venango Nat. Bank v. Taylor*, 842.
3. *Of excessive interest.*] Where the two years within which an action lies to recover back twice the illegal interest paid, have elapsed, the right to set off such interest against a claim of the bank is also barred. *Shinkle v. Nat. Bank*, 824; *Higley v. Bank*, 833. *See, however, Duncan v. Bank*, 360.

*See* INTEREST.

## SHARES.

*Taxation of.*] *See* TAXATION.

## SHAREHOLDERS.

*See* STOCKHOLDERS.

## STATE BANKS.

1. State banks may become National banks without authority from the State. *Casey v. Galli*, 142.

STATE BANKS—*Continued.*

2. Congress may lawfully tax notes issued by State banks, or restrain their circulation. *Veazie Bank v. Fenno*, 22.

*Change of, into National banks.*] See CONVERSION, 527.

See NATIONAL BANKS; TAXATION.

## STATUTE OF LIMITATION.

See LIMITATION OF ACTION.

## STOCK.

1. National banks cannot acquire a lien on their own stock. *Bank v. Lanier*, 70; *Bullard v. Bank*, 93.
2. *Increase of—taxation of increased stock.*] Where a National bank voted to increase its capital stock, and the requisite number of new shares were subscribed and paid for before the 1st of January, 1872, and a semi-annual dividend, declared as of that day, was paid upon the new shares, as well as the old, but such increase of capital was not approved by the Comptroller of the Currency, nor his certificate issued until the 5th of January, 1872. *Held*, that such new shares were not the subjects of taxation under an ordinance imposing a tax on bank shares "in the hands of the tax payers on the 1st of January, 1872." *Charleston v. People's Nat. Bank*, 898.
3. *How stock increased.*] There can be no increase of the capital of a National bank until the Comptroller of the Currency approves thereof and issues his certificate, as provided by section 13 of the act of Congress providing for the organization of National banks. *Ib.*
4. *Reduction of.*] Where a National bank reduces its capital stock it cannot retain as a surplus fund, or for other purposes, the whole or any portion of the money which it receives for the stock which is retired. *Seeley v. The New York Exchange Nat. Bank*, 804.
5. *Right of National banks to purchase.*] Although National banks are impliedly prohibited from dealing in stocks, yet they may take stock in payment or compromise of a doubtful debt, or may purchase it to avoid loss on a debt, and with an honest intent to convert it into money. *First Nat. Bank v. Nat. Exchange Bank*, 124.

## STOCKHOLDER.

1. *What constitutes.*] Shares of stock in a National bank were issued to defendant as collateral security for money loaned the bank, and the dividends thereon were paid to him. *Held*, that defendant thereupon became a shareholder as to creditors and liable as such. *Wheelock v. Kost*, 406.
2. *Estopped from questioning incorporation.*] A stockholder in a *de facto* National bank, who has participated in its transactions as such and received dividends, is estopped from denying the legality of its incorporation. *Ib.*
3. *Liability of one holding stock as collateral.*] A person who appears upon the books of a National bank as the legal owner of shares of its stock is, upon the failure of such bank, liable for the debts of the association to

STOCKHOLDER—*Continued.*

the extent of the shares held by him, although he received and holds such shares as collateral security for a loan to a shareholder. *Hale v. Walker*, 471; *Magruder v. Colston*, 554; *Wheelock v. Kost*, 406.

4. *Liability of pledgee of stock.*] Stock in a National bank was pledged to secure a debt, with power to the pledgee to sell it on default of payment. *Held*, that a sale by him pursuant to the power was not voidable as a fraud on creditors of the bank, though he sold because he believed the bank insolvent, and in order to escape personal liability as a stockholder. *Magruder v. Colston*, 554.
5. —.] Persons who hold stock of a National bank in pledge, the certificates of which stand on the books of the bank in the name of the pledgee, are, in contemplation of the National Banking Act, stockholders, and so long as they thus hold the stock in pledge are responsible to the creditors of the bank in proportion to the amount so held. *Ib.*
6. *Transfer of stock to escape liability to creditors.*] Shareholders in a National bank, knowing it to be insolvent, transferred their shares for the purpose of escaping liability to creditors. *Held*, that as to such creditors the transfer was void. *Bowden v. Santos*, 271.
7. *Shareholder's right to transfer shares in a National bank.*] Under the National Banking Act, a shareholder has the right to make an actual and *bona fide* sale and transfer of his shares to any person capable in law of taking and holding the same, and of assuming the transferor's liabilities in respect thereto; and, in the absence of fraud, this right is not subject to a veto by the directors or the other shareholders. *Johnson v. Lufkin*, 331.
8. *Liability terminates on transfer.*] Where such a sale of shares is made and the transfer entered on the books of the bank, the transferor ceases to be a shareholder, and is freed from liability in respect of such shares. *Ib.*
9. *Directors cannot restrain right.*] The provision of the National Banking Act (Rev. Stats., § 5139) that shares shall "be transferable on the books of the association," construed; and held not to give the directors the power to refuse to register a *bona fide* transfer of stock without some valid and sufficient reason for such refusal. *Ib.*
10. *Elements of a complete transfer.*] As between the seller and purchaser of shares in a National bank, the sale is complete when the certificate of the shares duly assigned, with power to transfer the same on the books of the bank, is delivered to the buyer, and payment therefor is received by the seller; and either the purchaser or seller may compel a registration of the transfer on the books of the bank, unless the bank has some valid and sufficient ground for refusing to register the transfer. *Ib.*
11. *Sale to president of bank — how far shareholder is affected with knowledge of condition of bank.*] The defendant Laffin, owning full-paid shares of stock in a National bank of which his co-defendant, Britton, was the president, employed a broker to sell the same in the market; the broker, without Laffin's direction or knowledge at the time, sold the same at the market value to Britton individually, and received in payment his individ-



STOCKHOLDER—*Continued.*

ual check on the bank for the purchase-price, and delivered to the purchaser the share certificates assigned in blank with blank powers of attorney thereon indorsed, authorizing the transfer of the shares on the books of the bank; subsequently, after the amount of the check had been collected, but on the same day, the president, without the knowledge of Laffin or the broker, directed the book-keeper of the bank to credit his individual account with the amount of the check which he had given for the shares, and to transfer the shares (the book-keeper inserting his own name in the blank power of attorney as attorney to make the transfer) to Britton, "trustee," not specifying for whom he was trustee, and charging the sum to the "sundry stock account" of the bank, all of which was done. The bank, although it had not committed any act of insolvency, was then insolvent, but this fact was not known by Laffin or the broker. *Held*, that, although the bank, or its officers for it, was prohibited from purchasing its own shares (Rev. Stat., § 5201), yet that Laffin having sold in good faith, without notice of the illegal purpose of Britton in buying the stock, or of his intended misappropriation of the funds of the bank in paying therefor, was not liable to pay back to the receiver the money received in payment of the shares. *Ib.*

12. *Presumption as to citizenship.*] In an action by a National bank in the United States Circuit Court, the stockholders of the bank will be presumed to be citizens of the State where the bank is located. *Manufacturers' Nat. Bank v. Baack*, 161.
13. *Action to enforce liability of.*] The Comptroller of the Currency must decide when and to what extent proceedings shall be taken to enforce the liability of shareholders in National banks, and in an action therefor such determination must be averred and proved. *Kennedy v. Gibson*, 17.
14. *Parties to such actions.*] When contribution only is sought, all the stockholders who can be reached by the process of the court may be joined in the suit, but it will be no objection that there are others beyond the jurisdiction of the court who cannot for that reason be made co-defendants. *Ib.*
15. *Action by creditors.*] Creditors cannot proceed directly in their own name against stockholders of National bank, nor are they proper parties to a suit by the receiver. (See, however, at Act June 30, 1876.) *Ib.*
16. *Liability of, how enforced—determination of Comptroller as to liability of, conclusive.*] The order of the Comptroller of the Currency determining to what extent the individual liability of the stockholders of an insolvent National bank shall be enforced, is conclusive on the stockholders; and the amount bears interest from the date of the order. *Casey v. Galli*, 142.
17. *Action at law—estoppel.*] When the order is to collect the full amount of the par of the stock, the action therefor must be at law, and in such action the stockholder is estopped from denying the existence or the validity of the corporation; the certificate of the Comptroller is conclusive as to the validity of the organization of such corporation. *Ib.*
18. *Individual liability of stockholders, how enforced.*] In winding up an insolvent National bank, the Comptroller of the Currency is vested with authority to determine when a deficiency of assets exists, so that the

STOCKHOLDER—*Continued.*

individual liability of the stockholders may be enforced, and no appeal lies from his decision. *Bailey v. Sawyer*, 356.

19. *Liability, when fixed.*] The liability of a stockholder of a National bank is several, and is fixed by his taking stock in the corporation. *Ib.*
20. *Action to enforce.*] When an assessment upon the stockholders is ordered by the Comptroller, a suit at law is the proper remedy to enforce it. *Ib.*
21. *Attachment of stock.*] The shares of a stockholder may be attached by the bank for a debt due it. *Hagar v. Union Nat. Bank*, 523.
22. *State statute requiring cashier to send list of shareholders to town clerks valid.*] A State statute required, under a penalty for his neglect or refusal, the cashier of each National bank within the State to transmit annually to the clerks of the several towns in which any stock or shareholder should reside, a true list of the names of such stock or shareholders on the books of such banking association, together with the amount of money actually paid in on each share. *Held*, that the statute was valid. *Waite v. Dowley*, 137.
23. *Reduction of capital.*] Upon the reduction of the capital stock of a National bank, it cannot retain as a surplus, or for other purposes, the money received for the stock retired. *Seeley v. New York Exchange Nat. Bank*, 804.

## SUITS.

*See* ACTIONS.

## SURETIES.

*Usury does not discharge.*] The discounting of a note for the principal maker, at an unlawful rate of interest, is not such an unauthorized use of the note as will discharge the sureties from liability. In the absence of any express agreement or understanding on that subject between the sureties and the principal, of which the holder had notice, or any intention to practice a fraud on the sureties, they must be held to have trusted to the judgment and discretion of the principal, as to the terms on which the note might be discounted. *First Nat. Bank v. Garlinghouse*, 811.

*On bond of cashier.*] *See* BOND.

## SURPLUS.

1. Where the shares in National banks are required by statute to be assessed at their par value, the surplus fund of such banks in excess of the amount required by law to be kept on hand is taxable. *First Nat. Bank v. Peterborough*, 658.
2. The undivided surplus of National banks, if not invested in Federal securities, may be taxed against the bank, where it is not included in estimating the value of the shares. *State v. City of Newark*, 672.

## TAXATION.

1. *Of capital.*] Where the capital stock of a National bank is invested in United States securities it cannot be taxed by the State. *Van Allen v. Assessors*, 1; *People v. Commissioners*, 9; *Bradley v. People*, 14; *Nat. Bank v. Commonwealth*, 34; *Collins v. Chicago*, 191.
2. *Of shares of stock in National banks.*] A State may authorize the taxation of the shares of stock of National banks in the hands of stockholders, although the capital of such bank be wholly invested in stocks and bonds of the United States. *Van Allen v. Assessors*, 1; *People v. Commissioners*, 9; *Bradley v. People*, 14; *Nat. Bank v. Commonwealth*, 34.
3. *Limit of restriction on State taxation.*] The National Banking Act does not curtail the power of the State to tax shares of stock in National banks, or cut off the right of the State to exempt certain kinds of property if it chooses to do so. Its only object is to prevent unfriendly discrimination against National banks. *Adams v. Mayor*, 148; *National Bank v. Commonwealth*, 34; *Lionberger v. Rouse*, 41.
4. *Of shares at their market value.*] Shares of stock in National banks may be taxed at their market value. *Hepburn v. School Directors*, 113; *People v. Commissioners of Taxes and Assessments*, 130; *People v. Assessors*, 776.
5. *Effect of exemption of certain moneyed capital.*] The fact that under a State statute, certain property is exempt from taxation, does not render invalid a tax against shares of stock in National banks. *Hepburn v. School Directors*, 113; *Lionberger v. Rouse*, 41; *People v. Commissioners*, 9; *Adams v. Mayor*, 148; but see *City Nat. Bank v. Paducah*, 300.
6. *Section 41 of the National Bank Act construed — rate of taxation.*] The 41st section of the National Banking Act which provides that shares in National banks may be taxed by the States, "but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such States," means that the rate of taxation of the shares shall be the same, or not greater than upon moneyed capital of the individual citizen which is subject to taxation. Therefore, *held*, that the fact that individual citizens were not assessed on United States securities owned by them was not a valid reason against the validity of the State tax on the shares of National banks, the capital of which was invested in United States bonds. *People v. The Commissioners*, 9.
7. *State banks and National banks must be taxed alike.*] A tax on the capital of a bank is not equivalent to a tax on the shares, and therefore, where State banks are taxed on their capital only, a State statute imposing a tax on the shares of National banks is void. *Van Allen v. Assessors*, 1; *Bradley v. People*, 14.
8. *When National banks may be taxed beyond State banks.*] When a State has, by contract, disabled itself from taxing State banks of issue beyond a certain amount, but not its banks of discount and deposit, a tax levied on shares of stock in all banks is valid as to National banks, although greater than the State can collect of the State banks of issue. *Lionberger v. Rouse*, 41; but see *City Nat. Bank v. Paducah*, 300.

TAXATION—*Continued.*

9. *Action to enjoin taxes.*] A National bank is a proper party complainant to a bill in equity, to enjoin the collection of a tax upon its shares, assessed against its stockholders, if it be shown that the bank would be subjected to a multiplicity of suits, whereby its business will be interfered with, its credit impaired and its stock depreciated. *City Nat. Bank v. Paducah*, 300. See, also, *Merchants' Bank v. Cumming*, 926.
10. *Tax when enjoined.*] The remedy by injunction to stay the collection of a tax upon personal property may be invoked where the enforcement of the tax would lead to the multiplicity of suits, or where the law authorizing the tax is itself valid. *Ib.*
11. *Rate of taxation.*] Where, by the laws of a State, or municipality, different rates of taxation are imposed upon different classes of moneyed capital, such State or municipality may not tax the shares of National banks at the highest rate imposed upon any class, regardless of the proportion which that class bears to other classes; nor, upon the other hand, is it confined to the lowest rate imposed upon any class. *Ib.*
12. —.] Where different rates of taxation are prescribed for different classes of "other moneyed capital," the rate imposed upon shares in National banks should not, as a general rule, exceed that imposed upon other moneyed capital of the same class, viz., shares in State banks. *Ib.*
13. *Discrimination against National banks.*] Where, practically, the entire banking capital of the State of Kentucky was exempted from taxation beyond fifty cents per share, and included in this enumeration was a State bank in Paducah, the capital stock of which exceeded that of all the National banks located there, it was held that an ordinance imposing a tax of \$1.05 nominally upon all banks in the city, but from which the State banks had been adjudged exempt, was an unlawful discrimination against the National banks, and therefore invalid. *Ib.*
14. *Deduction for debts.*] Where other moneyed capital than bank stocks was also taxed at \$1.05, but with a proviso that from the amount of this capital the entire indebtedness of the owner should be deducted before the assessment was made, and no such deduction was allowed where such capital consisted of shares in National banks, the tax upon such shares was held invalid. *Ib.*
15. *Deduction for real estate.*] The tax was also held invalid for the reason that no provision was made for deducting the value of real estate owned by the bank, which was thereby subjected to double taxation. *Ib.*
16. *When court will restrain collection of taxes.*] Where there is no means of recovering back from the State taxes illegally assessed and paid into the treasury, a court of equity will enjoin their collection; and when both State and county taxes are included in one warrant and are for a common reason illegal, the court will at the same time determine the validity of both the State and the county taxes. *First Nat. Bank of Omaha v. County of Douglas*, 267.
17. —.] State authorities will be enjoined from collecting a tax on the capital stock of a National bank, invested in United States securities. *Ib.*

## TAXATION—Continued.

18. *Unjust discrimination — restraining collection of tax at suit of bank — parties.*] The shares of stock of a National bank were taxed at their full value, while other property was assessed at from thirty to forty per cent of its real value. *Held*, that the discrimination was unjust, and that the bank was a proper party to maintain a bill to restrain the collection of the tax beyond the proportion assessed on other property *Merchants' Bank v. Cumming*, 926.
19. *Authority of assessors.*] Assessors of taxes possess no authority except such as is conferred upon them by statute, and they must see to it that they act within the authority committed to them. *Nat. Bank of Chemung v. Elmira*, 715, and note, 722.
20. *When assessment void — recovery back of taxes.*] Assessors assessed a tax on the capital stock of a National bank, which was expressly prohibited by statute. The property of the bank was seized by the collector of taxes and sold to pay such tax and the proceeds paid over to the municipal treasurer. *Held*, that the assessment was void and that an action lay on behalf of the bank against the municipal corporation to recover the money. *Ib.* and note, 722.
21. *Where State banks are exempt.*] State banks were exempt from taxation under a statute passed prior to the National Banking Act. *Held*, that shares in National banks could nevertheless be taxed. *City of Richmond v. Scott*, 445.
22. *Double taxation.*] A tax was levied on money belonging to plaintiff on the first day of January. In March, he bought, with this money, shares in the stock of a National bank. *Held*, that the shares could be also assessed under a statute providing that persons should be assessed for bank stock held by them on April first. *Ib.*
23. *Restraining collection of tax.*] Where shares are taxable and no excessive valuation is complained of, the collection of a tax will not be restrained even though the assessors have arrived at a correct result by an erroneous method. *St. Louis Nat. Bank v. Papin*, 326.
24. *Shares, how assessed — cash value.*] A statute which requires assessors to tax shares of stock in National banks at their actual cash value, and in ascertaining that value to include in the estimate all reserve funds, profits, earnings and other values of the bank is valid. *Ib.*
25. *Of surplus capital.*] Where the shares of National banks are by statute required to be taxed at their par value, the surplus fund of such banks, in excess of the amount they are required by law to keep on hand, is taxable by the States in which the banks are located. *First Nat. Bank v. Peterborough*, 658.
26. —.] The undivided surplus of a National bank — if not invested in Federal securities — may be taxed against the bank, provided it is not included in assessing the value of the shares of stock in the hands of stockholders. *State, North Ward National Bank of Newark, Prosecutor, v. City of Newark*, 672.

TAXATION—*Continued.*

27. *How taxed in New Jersey.*] A local statute providing a special method of taxing shares of stock in National banks was rendered void by a constitutional amendment providing that "property shall be assessed for taxes under general laws and by uniform rules." *Ib.*
28. —.] By the present law of New Jersey the stock in National banks owned by non-residents of the State is taxable in the township or ward where the bank is situated, and that owned by residents of the State is taxable in the township or ward where the owners respectively reside. *Ib.*
29. *Nature of restriction on power of State to tax.*] The restriction on the power of the States in the matter of taxation of National banks does not arise from the fact that they are created corporations under an act of Congress. The States may lawfully tax the property merely of a corporation created by act of Congress, in common with other property of the same description throughout the State. But to the extent that such property is invested in the securities of the Federal government, it is beyond the power of the States to tax it against the corporation, without permission of Congress, for the reason that taxation, in that respect, would be indirectly a tax upon the credit and securities of the Federal government. *Ib.*
30. *Rate of, how determined — deductions for real estate.*] In assessing shares of stock in National banks in New York, the assessors must determine the actual value of the shares — taking into consideration all the capital of the bank, whether surplus or in real estate or otherwise, and then deduct from such value such sum as represents the proportion which the assessed value of the real estate bears to the assessed value of the entire capital. *People v. Commissioners*, 752.
31. —.] Thus, the capital of a National bank was \$1,000,000, and was represented by 25,000 shares of \$40 each. The assessors assessed the shares at \$56 each, making in the aggregate \$1,400,000, and the real estate at \$200,000. *Held*, that they should deduct from the assessed value of each share \$8, being one-seventh, or the proportion which the real estate bore to the aggregate assessed value of the shares. *Ib.*
32. *Erroneous assessment — failure to tax at real value — injury to other shareholders — correction of assessment.*] The relators were owners of stock in the N. bank, which was assessed at par, but which was worth more than par in the market. The shares of the M. bank, located in the same city, were also assessed at par, although they were worth more than the shares in the N. bank. The relators demanded a reduction of the assessment on their stock, either by a direct order of the court or by reassessment, on the ground that their stock, being less valuable than that of the M. bank, was erroneously taxed at the same rate. *Held*, (1) that the assessment was erroneous; (2) that although the assessment on the shares of the relators would be increased on a reassessment of their property pursuant to the statute, yet, as their shares were worth less than those of the M. bank, the failure to tax the latter at their full value increased the ratio of taxation upon the shares of the relators, and thereby injured

TAXATION—*Continued.*

- them; (3) that as the return to the *certiorari* did not set forth the value of all the bank stock worth more than par in the city or ward, the court had not the facts from which to determine the real extent of the injury, and could not, therefore, direct a reduction of the assessment; and (4) that the court could not, under the circumstances, direct a reassessment. *People v. Assessors*, 776.
33. *Of shares in a National bank situated in another State.*] Congress has the constitutional right to establish National banks in any State, and to provide that the shares of their capital stock shall be exempt from taxation by other States. *Flint v. Board of Aldermen of Boston*, 571.
34. —.] Under section 41 of the National Banking Act of 1864, it is unlawful for a State to impose a tax on shares owned by an inhabitant thereof in the capital stock of a National bank located in another State. *Ib.*
35. *Of shares of non-residents.*] Under a State Constitution requiring all property not specifically exempt, to be taxed, State assessors must tax the shares of National bank stock belonging to non-residents of the State in the city or town where the bank is located, although there is no State statute expressly directing such taxation. *Kyle v. The Mayor*, 808.
36. *Where shares to be taxed.*] A State statute required the assessors of each city and town in which any shareholder in National banks resided to include such shares in the assessment of such person. The defendant resided in Boston, owned shares in several National banks there situated, and was there assessed on such shares. He refused to pay the tax on the ground that the State statute was in violation of the National Banking Act permitting States to tax shares of National banks "at the place where such bank is located and not elsewhere." *Held*, that as in this case the assessment was in conformity to the act of Congress, the defendant had no cause for complaint and could not impeach the validity of the State statute. *Austin v. The Aldermen*, 15.
37. *Validity of statute providing where tax shall be assessed.*] A State statute provided that the stockholders in National banks should be taxed on such stock in the county, town or district within the State where such bank was located, whether such stockholders resided in such town, county or district, or not. *Held* to be constitutional and valid. *Tappan v. Merchants' Nat. Bank*, 100.
38. *Constitutional law.*] By an act of the Indiana Legislature passed in March, 1867, shares of the capital stock of National banks within the State were taxed for that year, and the cashier of each bank was required to represent each stockholder in listing and valuing his stock. *Held*, that the statute took effect from the 1st day of January, 1867, that it was a valid exercise of the taxing power, and that it did not conflict with the constitutional requirement of "a uniform and equal rate of assessment and taxation." *Whitney v. Ragsdale*, 429.
39. *Place of taxation.*] The requirement of such act, that the stock shall be taxed at the place where the bank is located, is not invalid where the owner of the stock lives in another county or State. *Ib.*

## TAXATION—Continued.

40. *What is not a tax for "municipal purposes."*] Under a statute of Indiana, National bank stock was not taxable for municipal purposes. *Held*, that a tax for school purposes or for a donation by a township to aid in building a railroad was not a tax for "municipal purposes," and, therefore, not within the restriction. *Root v. Erdelmeyer*, 432.
41. *Of personal property of National banks.*] The personal property and assets of National banks, such as safes, office furniture, etc., are not taxable. *Nat. State Bank of Oskaloosa v. Young*, 451.
42. *Of banking-house.*] Under a statute requiring shares in National banks to be taxed at their actual value without reduction for real estate, the banking-office and lot, owned and occupied as its place of business by a National bank created, is not liable to assessment and taxation as real estate *eo nomine* against the bank. *Board of County Commissioners of Rice County v. Citizens' Nat. Bank of Faribault*, 629.
43. *Requiring banks to pay tax assessed on shareholders.*] National banks may lawfully be required to pay the tax assessed on the shares of stock. *Nat. Bank v. Commonwealth*, 34; *First Nat. Bank v. Douglas County*, 268.
44. *Payment of tax by bank.*] Under the statute of Iowa a National bank is not liable for the tax assessed against a shareholder unless it have in its possession dividends or property belonging to such shareholder. *Hershire v. The First Nat. Bank*, 476.
45. *Distrain of bank property to enforce payment of tax.*] A State statute provided that "the stockholders of every National bank located in this State, or of any bank incorporated under the laws of the State, shall be assessed and taxed on the value of their shares of stock therein, subject to the restriction that taxation of such shares shall not be at a greater rate than is assessed upon any other moneyed capital in the hands of individual citizens of this State in the county or precinct where such bank is located. The taxes against such shares shall be levied against the holder of the same, and shall be paid by the bank." *Held*, that a tax so imposed on the shares of a National bank was valid, and that payment thereof could be enforced by distraint of the property of the bank. *First Nat. Bank v. Douglas County*, 268.
46. —.] A collector of taxes has not, in the absence of express statutory authority therefor, no authority to seize the property of a National bank to satisfy a tax against a shareholder. *First Nat. Bank v. Hershire*, 465.
47. —.] A warrant for the collection of a tax assessed to the shareholders on shares of stock in a National bank, directed the collector "to levy the same of the goods and chattels of such persons." *Held*, that the collector could not thereon seize the property of the bank to pay the tax. *First Nat. Bank of Sandy Hill v. Fancher*, 697.
48. *How collected in Maine.*] The plaintiff, a non-resident of Bangor, was duly assessed therein, upon his shares of stock in the First National Bank. After legal demand, the plaintiff, refusing to pay the tax upon the warrant of the collector of the city, issued April, 1870, was duly arrested by the sheriff of the county in the following May, for the tax, which the plaintiff then



TAXATION—*Continued.*

paid under protest, together with costs, to the officer, and he to the city treasurer. In assumpsit to recover the money thus paid, *held*, (1) that the collection of such tax is to be enforced in accordance with the general law; and (2) that chapter 209 of the Public Laws of 1868 related exclusively to the assessment, and in no wise affected the collection of taxes duly assessed under previously existing laws. *Weld v. City of Bangor*, 521.

49. *List of shareholders—State statute.*] A State statute requiring the cashiers of National banks to send list of shareholders to town clerks is valid. *Waite v. Dowley*, 137.
50. *Must be expressly authorized.*] Municipal officers cannot assess a tax on shares of stock of a National bank unless authorized by a law of the State. *Stetson v. The City of Bangor*, 520.
51. —.] A statute authorizing "the taxation of all shares in moneyed corporations," *held* sufficient authority to tax shares in National banks. *Ib.*
52. *State statute prohibiting banking companies.*] A State statute prohibiting the establishment of banking companies in the State, without authority of the Legislature, does not apply to National banks. *Ib.*
53. *On increased capital.*] Where there is a vote to increase the capital stock of a National bank and the shares are issued and paid for, they cannot be taxed until the Comptroller of the Currency has approved of the increase and issued his certificate therefor. *Charleston v. People's Nat. Bank*, 898.
54. *Not liable to privilege tax.*] National banks are not liable to a privilege tax imposed by city ordinance on occupations and business transactions although "banks and banking" are in terms included. *Nat. Bank v. Mayor*, 903.
55. *Construction of statute.*] A State statute imposed a tax "on bank stock, of fifty cents on each share thereof equal to one hundred dollars of stock therein owned by individuals, corporations or societies." *Held*, to be a tax on the shares of the stockholders. *Nat. Bank v. Commonwealth*, 34.
56. —.] Under the Illinois statute of June, 1867, no deductions from the assessed value of shares in National banks could be made for the debts of the owner. *McVeagh v. Chicago*, 381.
57. —.] Method of taxation under the Illinois statute of 1867, explained. *Ib.*
58. —.] A statute providing that shares of stock in National banks shall be taxed in the county, town, or district where such banks are situated, whether the shareholder resides there or not, is valid. *First Nat. Bank v. Smith*, 390.
59. *Construction of Alabama statute.*] A State statute provided that all property, real and personal, not otherwise specified therein, or exempt from taxation, should be "listed" for taxation. There was an exemption of "all shares of the capital stock of any company or corporation which is required to list its property for taxation." *Held*, that this exemption did not apply to National banks whose capital was invested in government

TAXATION—*Continued.*

- bonds, and that the shares of such banks were property to be listed. *McIver v. Robinson*, 372.
60. *Of both shares and real estate—where no cause for complaint.*] A National bank alleged that it had been assessed on both its shares and its real estate, and that the value of the real estate was not deducted from the gross value of the shares. It appeared that the assessed valuation of both the real estate and stock was less than half their real value. *Held*, that the bank had no cause to complain. *Nickerson v. Kimball*, 409.
  61. *Taxation in Illinois.*] The Illinois Statute (Hurd's Rev. Stats., § 36), providing for the taxation of National banks, is constitutional. That statute explained and construed. *Ib.*
  62. *Construction of Iowa statute.*] A State statute providing for the taxation of shares in National banks having been declared illegal by the court because the capital instead of the shares of State banks were taxed, the Legislature passed a new statute for taxing shares in National banks, and therein repealed "all acts and parts of acts inconsistent" with its provisions. *Held*, that the repealing clause amounted to a repeal of the provision taxing the capital of State banks, and since those banks, if any there were, could be taxed on their shares under the general revenue law of the State, the provision for taxing National banks was in accordance with the act of Congress. *Morseman v. Yountkin*, 460.
  63. *Construction of Massachusetts statute.*] By the statute of June, 1868, chapter 349, of Massachusetts, entitled "An act concerning the taxing of bank shares," it was provided that the shares in National banks owned by non-residents of the Commonwealth shall be assessed to the owners thereof in the cities or towns where the banks are located; that the rate of taxation shall be the same as on other moneyed capital; that the value of such shares shall be omitted from the valuation upon which the rate is to be based, and that the act shall "apply to taxes assessed and collected for the present year in the same manner and to the same effect as if it had been in force on the first day of May." *Held*, that the act was not unconstitutional, either as being in violation of the act of Congress of 1864, chapter 106, section 47, and 1868, chapter 7, or as levying a tax in a disproportional manner, or as being retrospective in its operation. *Providence Institution for Savings and Jewell v. City of Boston*, 578.
  64. *Construction of Massachusetts statute—place of taxation.*] A statute made it the duty of every shareholder in a National bank to give notice to the bank of his true residence each year, and, in case of neglect, made the shares taxable where the bank was located as well as where the shareholder resided. *Held*, that a shareholder was rightfully taxed upon his shares in the town where he resided although he had, through an honest mistake, notified the cashier that his residence was in another town. *Goldsbury v. Inhabitants of Warwick*, 592.
  65. *Construction of Michigan statutes.*] By general law of a State, shares of stock in National banks were to be taxed in the township where the bank was located, except that where a stockholder resided in another township

TAXATION—*Continued.*

in the same county, his shares were to be there taxed. A village charter authorized the taxation of "all property, real and personal, within the limits of said village." *Held*, not to authorize a tax on shares of stock in a National bank located in such village, owned by a resident of another township in the same county. *Howell v. Village of Cassopolis*, 627.

66. *Deduction for debts in New York.*] By statute in New York, individuals were taxed on "the full value of all their personal property, after deducting the just debts owing by them." A subsequent statute provided that the owners of shares of stock in National banks situated in the State should be "taxed on the value of their shares of stock therein." *Held*, that a shareholder was not entitled to a reduction on the assessed value of his shares on account of debts. *People ex rel. Cagger v. Dolan*, 684.

67. *Of National bank notes.*] The circulating notes of National banks are not exempt from taxation by States. *Board v. Elston*, 425; *contra*, *Horne v. Green*, 643.

*Of circulation of State banks.*] See CONSTITUTIONAL LAW, 22; CIRCULATION. *When lien on shares—sale of shares without discharging lien.*] See SALE, 921.

*Of circulation of National banks.*] See CIRCULATION.

TELLER.

See EMBEZZLEMENT AND LARCENY.

TRANSFER.

1. *Of stock—bank cannot prohibit.*] National banks can acquire no lien on their own stock, and cannot, by law or otherwise, prevent a stockholder who is indebted to the bank from transferring his shares. *Bullard v. Bank*, 93; *Bank v. Lanier*, 70.
2. —.] A shareholder in a National bank has, in the absence of fraud, an absolute right to sell and transfer his shares, and this right is not subject to be cut off or abridged by either the directors or other shareholders. *Johnson v. Laflin*, 331.

*To avoid liability to creditors.*] See STOCKHOLDER, 211.

*By National bank, when void.*] See INSOLVENCY, 276, 285.

See STOCKHOLDERS.

ULTRA VIRES.

1. A National bank cannot deal in stocks, but it may take stocks in payment or compromise of a debt in order to avoid loss. *First Nat. Bank v. Nat. Exchange Bank*, 124.
2. Where a National bank received a deposit to hold as collateral security for the performance of an agreement between certain parties, *held*, that it was estopped from setting up the defense of *ultra vires* to an action to recover the deposit by one of the parties who had performed his part of the agreement, relying on the undertaking of the bank. *Bushnell v. Chautauqua Nat. Bank*, 794.

ULTRA VIRES—*Continued.*

3. Where a National bank has entered into a contract not authorized by its charter it cannot repudiate the contract and at the same time retain its fruits. *Casey v. La Société de Crédit Mobilier*, 285.

*See* BANKING BUSINESS; DEPOSITS FOR SAFE-KEEPING.

## UNITED STATES.

*Paramount lien.*] *See* LIEN.

## USURY.

*See* INTEREST.

## WINDING UP.

1. An action may be brought against a National bank after a receiver has been appointed. *Bank of Bethel v. Pahquioque Nat. Bank*, 77; *Security Bank v. Nat. Bank*, 774; *Green v. Walkill Nat. Bank*, 786.
2. An action may be prosecuted against a National bank although it has resolved to go into liquidation and has provided for the reduction of its circulating notes. *Ordway v. Central Nat. Bank*, 559.
3. In winding up a National bank, the Comptroller of the Currency must determine when and to what extent the liability of stockholders must be enforced, and this determination is conclusive; and in an action to enforce the liability, such determination must be pleaded and proved. *Kennedy v. Gibson*, 17; *Casey v. Galli*, 142; *Bailey v. Sawyer*, 356.
4. Where less than the entire liability of stockholders is to be enforced, a proceeding may be had in equity; but where the entire liability is to be enforced, the action must be at law. *Ib.*
5. National banks can be wound up only in the mode provided in the National Banking Act. *Re Manufacturers' Bank*, 192.
6. In cases not within the special provisions of the National Banking Act, a National bank may be proceeded against in the same manner as any other debtor or corporation. *Irons v. Manufacturers' Nat. Bank*, 203.
7. *What are debts against.*] Under section 50 of the act entitled "An act to provide a National currency," etc., the assets in the hands of the receiver of a bank that fails are, when reduced to money, to be ratably divided and appropriated to the payment of all legal liabilities of the association, whether such liabilities are debts, technically so called, or result from the non-feasance or malfeasance of the association in respect of its binding obligations and duties—as from its failures while in possession of bonds left by an individual with it on special deposit or for safe-keeping. *Turner v. The First Nat. Bank*, 454.
8. *Parties.*] In a proceeding for the adjudication of a claim against a National bank that has suspended, the receiver appointed under the National Banking Act may be properly joined as a party defendant. *Ib.*
9. Where the funds of an insolvent bank are sufficient to pay all claims against it and leave a surplus, the Comptroller should allow interest on

WINDING UP—*Continued.*

claims during the winding up proceedings ; and an action to recover such interest will lie against the bank. *Chemical Nat. Bank v. Bailey*, 260.

*See* INSOLVENCY ; RECEIVER.

## WORDS.

“ *Insolvency.*”] *See* INSOLVENCY, 276, 285.

“ *United States currency.*”] *See* CIRCULATION, 508.

“ *Municipal purposes.*”] *See* TAXATION, 432.











